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ONTARIO REPORTS,

VOLUME XVII.

CONTAINING

REPORTS OF CASES DECIDED IN THE QUEEN'S
BENCH, CHANCERY, AND COMMON
PLEAS DIVISIONS

OF THE

HIGH COURT OF JUSTICE FOR ONTARIO.

WITH A TABLE OF THE NAMES OF CASES ARGUED,
A TABLE OF THE NAMES OF CASES CITED,
AND A DIGEST OF THE PRINCIPAL MATTERS

"EDITOR":

JAMES F. SMITH, Q. C.

REPORTERS :

QUEEN'S BENCH DIVISION.....E. B. BROWN.
CHANCERY DIVISION..... { **A. H. F. LEFROY,**
 { **GEORGE A. BOOMER,**
COMMON PLEAS DIVISION **GEORGE F. HARMAN,**
BARRISTERS-AT-LAW

TORONTO:
ROWSELL & HUTCHISON,
KING STREET EAST.

1889.

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Attorney-General :

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REPORTS OF CASES

DECIDED IN

QUEEN'S BENCH, CHANCERY, AND COMMON
PLEAS DIVISIONS

OF THE

HIGH COURT OF JUSTICE FOR ONTARIO.

[COMMON PLEAS DIVISION.]

THE HAMILTON PROVIDENT LOAN AND INVESTMENT
COMPANY V. SMITH.

*Mortgage—Sale by mortgagor subject to mortgage—Further mortgage by
purchaser—Lien of mortgagor on land for amount of mortgage.*

The defendant mortgaged certain land to the plaintiffs, covenanting to pay the mortgage money, and then sold to S., who assumed payment of the mortgage as part of the purchase money. S. then gave a second mortgage to the plaintiffs, and then further mortgaged the land. Default having been made, the plaintiffs sued defendant to recover the amount of his mortgage, and prayed for judgment for the whole amount unpaid; but neither sale nor foreclosure was asked.

Held that the plaintiffs were entitled to judgment on the covenant against defendant for the amount of his mortgage; but that defendant was entitled to a lien on the land for the amount of the mortgage, which, as between him and S., S. had bound himself to pay; and leave was given to defendant to amend, and bring the proper parties before the Court so as to enforce his lien.

THE defendant made a mortgage on the property in Statement.
question to the plaintiff company, covenanting to pay the
moneys advanced on security of the mortgage.

He then sold to one Strong, who assumed payment of
the mortgage as part payment of the purchase money.
Strong obtained a further advance from the plaintiffs and
gave a second mortgage; and subsequently gave a third
mortgage to the defendant to secure payment of \$300, and
again mortgaged to one Howe.

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Statement. Default was made in the payment of the plaintiffs' mortgage from defendant; and this action was brought to enforce payment by defendant, judgment being prayed for the whole amount unpaid, but neither sale nor foreclosure of the premises was sought.

The defendant was willing to pay, but demanded an assignment of the mortgage to a trustee, which the company refused.

The case was tried before Rose, J., without a jury, at Toronto, at the Spring Assizes, 1888, on the pleadings and documents.

Muir, for the plaintiffs.

Creasor, Q. C., for the defendant.

The learned Judge reserved his decision, and afterwards delivered the following judgment.

April 21, 1888. ROSE, J.:—

The real contest between the parties is, whether the plaintiff company can require the defendant to pay off his mortgage, and thus free the land from its burden so as to enable the company to obtain payment of the second mortgage the property being said to be of insufficient value to satisfy both.

It is clear, as between Smith and Strong, the debt has become Strong's, and Smith is his surety: See *Campbell v. Robinson*, 27 Gr. 634; *Waring v. Ward*, 7 Ves. 322, at p. 337; *Jones v. Kenny*, 1 D. & W. 134, 155; *Corby v. Gray*, 15 O. R. 1.

It is also clear that the plaintiffs' remedy on the mortgage is against Smith: *Clarkson v. Scott*, 25 Gr. 373.

It would also seem settled law that the plaintiff company took no better position under the second mortgage than that occupied by Strong: *Harter v. Colman*, 19 Ch. D. 630; *Bird v. Wenn*, 33 Ch. D. 215.

I doubt if Smith, on the facts stated, is entitled to an

assignment of the mortgage on the payment of the debt, for if he obtained it to a trustee and undertook to foreclose, the plaintiff company would have a similar right to an assignment on payment of the amount, and so the difficulties pointed out in *Alderson v. Elgey*, 26 Ch. D. 567, would arise.

In this connection the cases of *Teevan v. Smith*, 20 Ch. D. 724, 730, and *Wilson v. Roper*, 12 P. R. 322, might be referred to.

But it appears to me that Smith is entitled to a lien upon the land for the amount unpaid on the mortgage at the time of the transfer to Strong, and which, as between them, Strong became bound to pay; and so the plaintiff company while entitled to judgment against Smith for the amount of the mortgage debt, cannot hold the premises freed from Strong's obligation to pay.

On the issue as presented the plaintiff is entitled to judgment on the covenant. The proper parties are not before the Court to enable a decree for foreclosure to be worked out.

If the defendant wishes to amend so as to have his right of lien enforced, he may do so, making the necessary parties. As to this and the question of costs, I will hear the parties.

Judgment accordingl

Judgment.

ROSE, J.

[COMMON PLEAS DIVISION.]

REGINA V. STEWART.

Medical practitioner—Practising medicine—Evidence of—Costs.

The defendant attended a couple of sick persons for which he received payment, but he neither prescribed nor administered any medicine, nor gave any advice, his treatment consisting of merely sitting still and fixing his eyes on the patient.

Held, that this was not a practising of medicine, contrary to the provisions of R. S. O. ch. 148, sec. 45, and a conviction therefor was consequently quashed, and with costs against the private prosecutor, as it appeared that he had a pecuniary interest in the conviction.
Regina v. Hall, 8 O. R. 407, distinguished.

Statement. THIS was a motion on behalf of the defendant, to quash a conviction made by the police magistrate of the city of Toronto, for an offence against the provisions of sec. 45 of the "Medical Act," R. S. O. ch. 148.

In Michaelmas sittings, 1888, *Hamilton Cassels* supported the motion.

Osler, Q. C., contra, referred to *Regina v. Hall*, 8 O. R. 407; *Woodward v. Ball*, 6 C. & P. 577; *Davies v. Macuna*, 29 Ch. D. 596; *Howarth v. Brearley*, 19 Q. B. D. 303; *Apothecaries Co. v. Nottingham*, 34 L. T. N. S. 76.

December 22, 1888. GALT, C. J. :—

The information charged that the defendant "being a person not registered under the Ontario Medical Act, did unlawfully practice medicine for hire, gain, or hope of reward."

It was proved that the defendant attended two patients, one a boy and the other a man, and that he did receive payment for such attendance; but it was also proved that he prescribed no medicine, nor did he administer any. I am therefore, at a loss to understand on what ground the police magistrate founded his judgment.

Mr. Osler contended that although it was true that no medicine had been prescribed or administered, yet that the defendant was liable under the Act, because he paid visits to a sick person for which he received payment; and he cited *Regina v. Hall*, 8 O. R. 407, in support of his contention.

Judgment.
GALT, C. J.

That case is, however, no authority for such a contention. The treatment "consisted of friction and irritation of the surface of the body and application of a certain oil by rubbing it on the parts of the body previously subjected to the friction. For this he received \$3 a visit." My brother Rose, although he quashed the conviction on other grounds, states in his judgment: "In addition to applying the oil the defendant prescribed and ordered aperient medicine. What exactly, practicing medicine may mean, I do not undertake to define. I think, however, this is a case of practicing medicine."

It will be seen, from the foregoing, that the circumstances of the case were entirely different from the present. What the defendant did was simply to sit still and fix his eyes on the patient; and, according to the evidence of one of the witnesses, his treatment was beneficial, for she states, "I think I got the worth of the money; my husband is better; he gives no medicine."

This conviction must be quashed, with costs against the informant, for I see by sub-sec. 2 of sec. 57 he has a pecuniary interest in the prosecution.

No action is to be brought against the magistrate, nor against the prosecutor, except as to payment by him of the costs.

MACMAHON, J.—I fully agree in the judgment of the learned Chief Justice.

In the *Imperial Dictionary*, "medicine" is defined as "any substance, liquid or solid, that has the property of curing or mitigating disease, or that is used for that purpose."

To practise medicine must, therefore, be to prescribe or administer any substance which has, or is supposed to have, the property of curing or mitigating disease.

Judgment.**MACMAHON,**

In the present case there was neither a prescribing nor an administration of any medicine, by the defendant; nor, as far as the evidence shews, did he ever give advice to those whom he called to see.

There was, therefore, no infraction by the defendant of the 45th sec. of R. S. O. ch. 148; and the conviction must be quashed with costs, to be paid by the prosecutor.

Conviction quashed.

[COMMON PLEAS DIVISION.]

FLANNIGAN V. THE CANADIAN PACIFIC RAILWAY COMPANY.

Railway—Negligence—Dry grass growing on side of track—Fire therefrom—Liability of company.

During a very dry summer—little rain having fallen, and none for some time prior to the fire in question, fires also having been frequent in that section of the country, the defendants allowed brush and long dry grass, which had been growing for two or three years to remain uncut on the side of the track adjoining the plaintiffs' farm, while they had the day previous to the fire, for the protection of their own property on the other side of the track, burnt up the dry grass etc. there. A spark from defendants' engine having set fire to the dry grass etc. adjoining the plaintiff's land, the fire extended and destroyed his fences, growing crops, etc. In an action against defendants therefor, all these circumstances were laid before the jury, who found for the plaintiff.

Held, that the case having been properly submitted to the jury, their verdict could not be interfered with.

This was an action to recover from the defendants damages for the destruction by fire of the plaintiff's fences, meadow, pasture, horse-rake, hay, growing crops and surface soil on his farm in the township of Oxford, in the county of Grenville, which fire the plaintiff alleged in his statement of claim was caused by the defendants' negligence in allowing brushwood, dry grass, rubbish and other combustible material to remain on the line of their railway; and that sparks from an engine, running on the said railway, set fire to such dry grass, rubbish, &c., on the line of the railway,

and from thence spread to the plaintiff's farm, and destroyed his fences, growing crops, &c. Statement.

The cause was tried before Street, J., and a jury, at Brockville, at the Fall Assizes of 1888.

The St. Lawrence and Ottawa Railway, now owned by the defendants, runs through lot 25, in the 5th concession of the township of Oxford, occupied by the plaintiff as the lessee thereof; and on the 10th of August, 1888, between three and four o'clock in the afternoon, shortly after a train had passed, a fire, which was stated by a witness named Sword to have started within the railway enclosure, was discovered by him when it had burned three or four panels of the fence dividing the railway lands from the plaintiff's farm, and the fire had spread into the plaintiff's meadow, and from the high wind spread with great rapidity to the barn, which was destroyed with its contents, stated to be about 27 loads of hay.

The summer of 1888 was a very dry one, little rain having fallen during the season, and none for some time prior to the date of the fire. Fires had also been frequent through that part of the country during the few weeks preceding the one which destroyed the plaintiff's property.

There was evidence that on the sides of the track there was brush and long grass; and the plaintiff stated, when under cross-examination, there was stuff there that had been growing two or three years; and on the 9th of August the railway section-men burned the long grass in the immediate vicinity of a pile of snow gates belonging to the railway company, which were on the west side of the track, and directly opposite to the plaintiff's meadow, which was to the east of the track; but they did not burn the grass on the east side. One of them said he had examined the place after the fire, and "that on the east side of the track the grass was not burned except where the fire had apparently started. It was not either cut nor the grass burned."

There was no conflict of evidence as to the value of the property destroyed.

Statement. The learned Judge charged the jury, and submitted certain questions to them which, with their answers, were as follows :

1. Was the fire of the 10th August caused by sparks escaping from one of the defendants' engines? Yes.
2. Did the fire commence within the railway company's fences or upon the land of the plaintiff? Within the railway company's fences.
3. If the fire originated upon the company's land, was it in any place where dry grass and bushes grew? The fire started where the dry grass and bushes grew.
4. Had the railway company properly cleaned their land from old grass and bushes in the spring before the fire? No, they had not.
5. Had the railway company omitted any proper precaution for preventing the sparks from the engine from kindling fire upon the land? Yes.
6. If so, what precaution did they omit? They omitted to remove the dry grass and bushes.
7. If the plaintiff is entitled to recover damages on account of the fire of the 10th of August, at what sum do you fix them? \$414.

Upon these findings the learned Judge ordered that judgment be entered for the plaintiff for the sum of \$414.

In Michaelmas Sittings, 1888, the defendants moved to set aside the findings of the jury and the judgment entered thereon, and to enter a judgment for defendants, or for a new trial. The notice of motion, although embracing five grounds, was, upon the argument, practically reduced to three, namely: that the findings of the jury were contrary to law and evidence and the weight of evidence: that there was no evidence of negligence on the part of the defendants in omitting to remove dead grass and bushes from the lands; and that there was no evidence that the fire started where dried grass and bushes grew, as found by the jury in their answer to the third question.

In the same Sittings, *R. W. Scott* Q.C., and *G. H. Watson*, supported the motion, and referred to *Smith v. London and South Western R. W. Co.*, L. R. 6 C. P. 14; *Moxley v. Canada Atlantic R. W. Co.*, 14 A. R. 309; *McGibbon*

v. *Northern R. W. Co.*, 14 A. R. 91; *Jaffrey v. Toronto, Grey and Bruce R. W. Co.*, 24 C. P. 271; *Hill v. Ontario, Simcoe and Huron R. W. Co.*, 13 U. C. R. 503; *Hewitt v. Ontario, Simcoe and Huron R. W. Co.* 11 U. C. R. 604; *Texas and Pacific R. W. Co. v. Levi*, 13 Am. & Eng. Ry. Cas. 464; *Gibbins v. Wisconsin Valley R. W. Co.*, 13 Am. & Eng. Ry. Cas. 469; *White v. Missouri Pacific R. W. Co.*, 13 Am. & Eng. Ry. Cas. 473, 475; *New Brunswick R. W. Co. v. Robinson*, 11 S. C. R. 688; *Simkin v. London and North Western R. W. Co.*, 21 Q. B. D. 453.

Wallace Nesbitt and Kidd, contra, referred to *Piggot v. Eastern Counties R. W. Co.*, 3 C. B. 229; *Smith v. London and South Western R. W. Co.*, L. R. 5 C. P. 98, L. R. 6 C. P. 14; *Gibson v. South Eastern R. W. Co.*, 1 F. & F. 23; *Aldridge v. Great Western R. W. Co.*, 3 M. & G. 515; *Redfield on Railways*, 6th ed., p. 467, *et seq.*

December 22, 1888. MACMAHON, J.:—

My brother Street left the case to the jury with a charge to which the defendants could have no reasonable grounds of complaint.

Counsel for the defendants admitted that had the railway company cut the grass and brush, and piled the same along the sides of the railway line, and it had become ignited from a passing engine, and spread to the plaintiff's farm and destroyed his property, the railway company would have been liable under the authority of *Smith v. London and South-Western R. W. Co.*, L. R. 5 C. P. 98, and L. R. 6 C. P. 14. But that not having increased the risk to the plaintiff's property by cutting the grass, and thus, as it were, adding to its combustible nature, negligence cannot be imputed to them; and therefore that the case should not have been submitted to the jury.

I have examined a number of authorities in the American Courts on this question; and it is not, according to these authorities, by any means a conclusion of law that a railway company is guilty of negligence to be inferred

Judgment. from the fact that fire ignited in dry weeds or grass upon
MACMAHON, their land ; but that it is a question of fact to be determined by the jury in view of the extent to which the weeds and grass have been permitted to accumulate on their right of way, the season of the year, and all other circumstances affecting the liability to fire: *Ohio and Mississippi R. W. Co. v. Shanefelt*, 47 Ill. 497, at p. 500 ; or, as stated in *Wharton on Negligence*, 2nd ed., sec. 873: "For a railroad company to leave light combustible material, consisting either of dry grass or light wood, along its line, in such a situation as readily to ignite from sparks, is such negligence as will justify a jury in holding it responsible for damage sustained by a fire communicated from such combustible material to a neighbouring field."

In the present case the jury were called upon to consider the fact of the dryness of the season, the extent of the dry grass and brush along the side of the track, and also the fact that the day previous to the fire which destroyed the plaintiff's property, the railway company, taking what they deemed a necessary precaution for the preservation of their own property—the snow gates—had burned the grass and weeds on the west side of the track in close proximity thereto.

With these facts in evidence the case was properly submitted to the jury ; and with their finding upon the facts we do not feel called upon to interfere.

The motion must be dismissed, with costs.

GALT, C. J., and ROSE, J., concurred.

Motion dismissed.

[COMMON PLEAS DIVISION.]

REGINA V. CARDO.

Criminal law—Rape on daughter—Evidence of.

The defendant was indicted and convicted for committing a rape on his daughter. The learned Judge left it to the jury to say whether on the evidence the act of connection was consummated through fear, or merely through solicitation.

Held, that the question was one of fact entirely for the jury, and could not have been withdrawn from them, there being ample evidence to sustain the charge, and it having been left to them with the proper direction in such a case.

THE prisoner was indicted and tried before the Chief Justice of this Division at the Autumn Assizes for 1888, for having committed a rape upon Jennie Cardo on the 9th of July, 1888.

Statement.

The prisoner was found guilty; and the learned Chief Justice reserved for the opinion of the Justices of this Division, the question whether there was evidence to go to the jury on the indictment preferred against him.

In Michaelmas Sittings, 1888, the case was argued.

N. Murphy, for the prisoner, referred to *Regina v. Jones*, 4 L. T. N. S. 154; *Regina v. Day*, 9 C. P. 722; 1 *Hale* P. C. 627, 635.

Irving, Q.C., for the Crown.

December 22, 1888. MACMAHON, J.:—

On the argument before us counsel for the prisoner endeavoured to show that the evidence established that it was through solicitation, and not from fear, that the prosecutrix submitted to the prisoner having connection with her; and therefore the prisoner could not properly be convicted of the crime of rape.

The prosecutrix is a daughter of the prisoner, and is 15 years of age; and from her evidence at the trial, it appears that on the night of the 9th of July the prisoner

Judgment.
MACMAHON,
J.

returned home to his house on Monro Street, in the city of Toronto, about 11.30 o'clock, his wife, and his daughter Jeannie (the prosecutrix), and two children younger than the prosecutrix, then being in the house—the two younger children being in bed. The prisoner, after coming in, beat his wife, and she left the house. After his wife had left, the prisoner went out, taking the prosecutrix with him, to search for Mrs. Cardo, and after calling at the houses of several neighbours and not finding her, they returned home. The prosecutrix was in the habit of sleeping with the younger children in another room to that occupied by her father and mother; but on the night in question the prisoner made the prosecutrix go into his bed-room and get into bed, although she did not want to. When asked, "How did he make you go?" her answer was, "Well, he says, you will have to come; he says, when I tell you to come, you will have to come." He then, as she says, outraged her, when she got away and went to her own bed, from which he removed her twice (in one instance carrying her from her own bed), and on each occasion of removing her he outraged her in his own bed, although she begged him to let her alone and not to do it.

The prosecutrix said: "I told him to stop, and he would not; I called out to him, and told him to stop again, and I started to scream. He says to me—'Hush! Maggie will hear you.'"

Mr. Murphy, in his exhaustive argument, pointed to this and other evidence of a similar nature elicited from the prosecutrix in support of his contention, that it was through solicitation, and not from fear, the prosecutrix acted in permitting connection to take place.

As to whether the prosecutrix was acted upon through solicitation, or submitted through fear, is, as I shall hereafter point out, solely a question for the jury to decide upon.

The prosecutrix in her evidence also stated that the prisoner made use of the following expressions: "There is no use hollowing out—you are ruined for life. This is a

terrible thing to do to my own daughter. Do you know Judgment.
I would get twenty years for this."

MACMAHON,
J.

At an early hour the following morning the prosecutrix was seen by the next door neighbour crying, and upon being asked what was the matter, said she would tell her shortly, and did communicate to the neighbour what had happened immediately after her father left the house to go to his work. And she also told her mother who returned home that morning.

The prosecutrix was examined by a physician on the morning of the 10th of July, who found that she had been outraged; and there was evidence that a man had recently had connection with her.

On that morning also she laid a complaint before the police magistrate, charging her father with the crime.

The point directly involved in this case was considered in *Regina v. Day*, 9 C. & P., 722, by Coleridge, J., who, at p. 724, says: "Consent or non-consent on the part of the prosecutrix becomes material; * * but then we must look at the nature of the circumstances from which consent is inferred. There is a difference between consent and submission; every consent involves a submission; but it by no means follows, that a mere *submission* involves *consent*. It would be too much to say, that an adult submitting quietly to an outrage of this description was *not* consenting; on the other hand, the mere submission of a child when in the power of a strong man, and most probably acted upon by fear, can by no means be taken to be such a consent as will justify the prisoner in point of law. You will therefore say whether the submission of the prosecutrix was voluntary on her part, or the result of fear under the circumstances in which she was placed."

The case of *Regina v. Jones*, 4 L. T. N. S. 154, is, in its circumstances, somewhat similar to the present case. There the prisoner was indicted for having committed a rape upon his daughter, a girl 14 years old. The prisoner told his daughter to go to the door and see if her mother was coming home, and upon her telling him she was not

Judgment.
MACMAHON,
J.

coming, he threw her (the prosecutrix) on a bed in the room, and had connection with her. It appeared he had had connection with her on several occasions previously; but the prisoner had told her not to tell anyone, threatening if she did so to throttle her, and kill her, and that she consented to her father's having connection with her because she was afraid of him.

Baron Channell, in charging the jury, said: "If in this case it is made out to your satisfaction that a kind of reign of terror was set up in this family, and in consequence of that terror and dread the girl allowed the connection to take place without resistance, then you may convict."

The prisoner Cardo had, on that night at least, created terror in his household, because he had beaten and driven his wife from the house; and he told the prosecutrix, when out with her endeavouring to find his wife, that he would whip her within an inch of her life if he got her.

We have not the charge of the learned Chief Justice in this case. But at the conclusion of the examination in chief, Mr. Murphy, as counsel for the prisoner, subnitted to his lordship that on the evidence the case should not be allowed to go to the jury. His Lordship replied, "It is for the jury to say, supposing they believe the crime committed, it will be for them to say, whether the girl was a consenting party; or, if she was not a consenting party, whether it was from fear of her father he accomplished his purpose."

The reply of his lordship to counsel is in consonance with the charge of the learned Baron who presided at the trial in *Regina v. Day*, where to repeat the language of the presiding Judge to the jury at the trial of that case "You will therefore say whether the submission of the prosecutrix was voluntary on her part, or the result of fear under the circumstances in which she was placed."

The learned Chief Justice could not have done otherwise than have submittted the case to the jury on the evidence, with such a charge as embodied the language employed, which I have already quoted, when he replied to the prisoner's counsel.

Under such a charge the question was one of fact ^{Judgment.} entirely for the jury ; and we must say there is the amplest ^{MACMAHON,} evidence to sustain the verdict. ^{J.}

There must be judgment for the Crown on the case reserved.

GALT, C. J., and ROSE, J., concurred.

Judgment accordingly.

[COMMON PLEAS DIVISION.]

THE MAIL PRINTING COMPANY V. DEVLIN AND GRAHAM.

Contract—Election to sue one of two persons—Evidence of.

The defendant D. after some correspondence with plaintiffs as to an advertising contract for the Union Medicine Co., had an interview with plaintiffs as to entering into same. A contract had been drawn up by plaintiffs in expectation that it would be made by the company, but on ascertaining that the company was not incorporated it was at plaintiffs' request signed by D., and the entry in plaintiffs' books was "G. A. Devlin, Toronto, Union Medicine Advertising Contract." The first and second payments were made by D., but on the third payment coming due, he stated his desire not to make it as it might prejudice a claim he had against G., his partner, with whom he had a dispute about the partnership affairs, whereupon plaintiffs saw G., and on his stating that it was D's business to pay this account, the plaintiffs sued D., and moved for judgment under rule 80, stating in their affidavit, in support of the motion that "the claim was under an agreement made between the parties &c., and that "the defendant" D "was and still is, justly and truly indebted to the plaintiffs in respect of the matters above set forth." D. put in an affidavit in answer, in consequence of which G. was made a party defendant, and the case proceeded to trial.

Held, that on the evidence the credit under the contract was given to D alone; but, even treating D. as an agent for an undisclosed principal, namely for G. as one of the firm, and therefore that G. might be jointly liable with D., the plaintiffs were bound to elect whether they looked to D. or the firm, and that there was a binding election not to treat the firm as liable, but to rely on the individual liability of D.

THIS action was brought to recover the amount of a balance remaining due on a contract to insert a certain number of advertisements, and was tried before Galt, C. J. and a jury, at the Toronto Autumn Assizes. 1888.

Statement.

The facts were as follows: The defendant Devlin, on the 25th July, 1887, had an interview with F.W. Thomson, book-keeper in the office of the plaintiffs. There had been some previous correspondence, in the course of which a letter was written by the plaintiffs to "Messrs. The Union Medicine Co.," being the name adopted by the defendants for carrying on business.

The interview followed upon the writing of the letter; and, in consequence of the offer therein made, Mr. Dyas, manager of the advertising department, was present. Devlin, as Dyas said, "wanted to sign the name of 'The Union Medicine Company.' I asked him if it was an incorporated company, and I understood him to say it was not; and I said, better sign your own name."

Thomson's evidence was: "I heard a conversation between Mr. Dyas and Mr. Devlin as to who should sign the contract. The conversation was, should Mr. Devlin sign the contract in the name of The Union Medicine Co., or in Mr. Devlin's own name; Mr. Dyas said he would just as soon have it signed in Mr. Devlin's own name. Mr. Devlin said it did not make any difference to him; or something of the sort."

The contract was then signed by "G. A. Devlin." It was on a printed form, and appeared to have been filled in in expectation that it would be signed in the firm or business name, as it authorized the publication of "our business announcements," "for which *we* agree to pay," &c.

The entry of the contract in the books, was "G. A. Devlin, Toronto, Union Medicine Co., advertising contract," &c.

The first and second payments were made by Devlin. When the third came due, he was seen, and said he did not want to pay it, as stated in Thomson's evidence, "he wanted this man Graham to put his money into the business; he wished his partner Graham to put what money he *was* to put in the business, and then he would pay the account."

Mr. Douglass, the secretary and treasurer of the plain-

tiff-company, was present. His account of the interview **Statement.**
was as follows :

"Q. What was the subject of conversation at that time? A. Well, we were discussing the question of the payment of this account chiefly.

Q. What was said, by Mr. Devlin, at that time, about paying the accounts? A. Well, Mr. Devlin said he was perfectly willing to pay the account: that it was all right; but there were reasons, certain reasons, why he could not pay it then; and the reason he urged chiefly was, that it might prejudice his claim with his partner. He claimed that he had a partner, Mr. Graham, and that they were quarrelling over partnership affairs, and if he made any payments before that matter was settled, it might be to his prejudice, otherwise he would be perfectly willing to pay the account. Furthermore, he offered at that time to give me security by mortgaging a property considerably beyond the value of the account against him; but the condition on which he was to give the mortgage was, that it should not be recorded, for the same reason, that it might prejudice his case with Graham.

Q. Was that mortgage accepted? A. It was not."

Graham was then interviewed; but referred the matter to Devlin, saying that it was his, Devlin's, business to pay all accounts of The Union Medicine Company.

The action was originally brought against Devlin alone. Douglass gave the instructions, and said his reason for suing Devlin alone was "because he signed the contract."

Motion for judgment was made under rule 80; and it was stated on affidavit, that the claim was "under an agreement *between the parties*," and that "*the defendant * * was and still is justly and truly indebted to the said plaintiffs in respect of the matters above set forth.*"

Devlin put in an affidavit in answer; in consequence of which Graham was then added as a party defendant; and the action was brought on for trial.

At the trial certain disputed questions of fact were tried by the jury; and the following questions answered.

"1. Did a partnership exist between the defendants as vendors of patent medicine? A. Yes.

2. Was the contract made in the interest of the partnership and in the partnership business? A. Yes.

3. What is the amount of damages? A. \$465."

At the close of the plaintiffs' case, Mr. Macpherson, for Graham, submitted:

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Statement. That there was no contract proven with the Union Medicine Company, but solely with G. A. Devlin.

2. That admitting there was a contract with the Union Medicine Company, the plaintiffs had made an election to charge Devlin by suing him, and could not now sue Graham.

The learned Chief Justice overruled the objection for the time being, observing that it could be discussed before the Court.

In Michaelmas Sittings, the defendant Graham moved on notice to set aside the judgment entered against him and to enter judgment in his favour dismissing the action as against him.

In the same Sittings, December 3, 1888, *H. J. Scott*, Q.C., and *Macpherson*, supported the motion, and referred to *Scarf v. Jardine*, 7 App. Cas. 345, 361; *Culder v. Dobell*, L. R. 6 C. P. 486, 497.

J. B. Clarke, contra, referred to Lindley on Partnership, 5th ed., p. 178.

December 22, 1888. ROSE, J.:—

The fact as to whom credit was given, has not been decided; and we are asked to draw the proper inferences of fact from the findings of the jury and the undisputed testimony.

It seems to me that it is not an unfair conclusion to say that credit was given to Devlin alone.

He was desired to sign the contract in his own name, no doubt to avoid possible complications arising from dealing with an unincorporated company; but that reason may have been quite sufficient to induce the managers of the plaintiff-company to prefer his individual liability. Then the account is opened with him; payments are made by him; he is looked to for payment; offers personal security, or rather security on his own real estate; and is sued on the contract, the plaintiffs' secretary making an affidavit

to the fact that the liability was under an agreement between the parties to the action—he being the sole defendant ; and that he, as such sole defendant, was liable in respect thereto. Judgment.
Rose, J.

But, treating Devlin as agent for an undisclosed principal, as was argued, being the highest ground upon which the claim could be rested, the principals being himself and Graham ; and assuming that by the contract thus made, he became liable individually ; and, as one of two principals, whom he was thus binding, if the plaintiff-company elected to charge the principals, it still seems to me there was no election in time to render the principals liable, and that there was a binding election not to treat them as liable, but to rely upon the individual liability of Devlin alone.

It is clear that Devlin, on such a contract, could not deny his individual liability. Say, if you please, that he was agent for the firm making a contract, which, by its terms, bound himself ; and if he was also liable at the election of the plaintiff-company as principal jointly with Graham, it is clear he could not have been sued in both capacities, and thus made doubly liable.

Let it once appear that the plaintiffs had no right to treat Devlin as liable both individually and as a member of the firm of Devlin & Graham ; but that they were bound to elect ; then it is clear that when Devlin was sued alone, “ the plaintiffs completed their election, and could go no further,” to use the language of Lord Blackburn, in *Searf v. Jardine*, 7 App. Cas. 361, where he states the principle as to what an election is.

The result would be as follows :

1. If the contract was with Devlin alone as principal, the partnership would not be liable.

2. If with Devlin as agent for his firm as undisclosed principals, Graham's name not then being made known, then he would be liable either individually or as a member of the firm jointly with his partner at the plaintiffs' election.

3. In the latter case, the election must be made within a reasonable time, else there would be no right to sue the

Judgment. principals: *Smethurst v. Mitchell*, 1 E. & E. 622. And
ROSE, J. when once made, could not be retracted: *Scarf v. Jardine*,
 7 App. Cas. 345.

In that case, Lord Blackburn said, at p. 360: "Now on that question there are a great many cases; they are collected in the notes to *Dumpor's Case*, 1 Sm. L. C., 8th ed., pp. 47, 54, and they are uniform in this respect, that where a man has the option to choose one or other of two inconsistent things, when once he has made his election it cannot be retracted, it is final and cannot be altered. '*Quod semel placuit in electionibus amplius displicere non potest.*' That is *Coke* upon Littleton, 146, *a*, and I do not doubt there are many older authorities to the same effect; but that rule has been uniformly acted upon from that time at least down to the present. When once there has been an election to do one of the two things you cannot retract it, and do the other thing; the election once made is finally made."

4. Suing Devlin alone, after knowledge of the fact of Graham being a partner, was an act of election: *Scarf v. Jardine*, *supra*.

5. The fact that he was a partner with Graham at the time, did not make him less an agent for the firm, but merely made him both agent and principal, that is, agent for the firm in which he was a principal: Story on Partnership, 7th ed., p. 1; *Cox v. Hickman*, 8 H. L. Cas. 268, 312; Lindley on Partnership, Bl. (5th Eng.) ed., sec. 248-9.

6. If Graham's name had been known at the time the contract had been made by Devlin; and, if it was made by him as agent for the principal, the plaintiff had an election then to treat the contract as made on behalf of Devlin & Graham: *Coder v. Dobell*, L. R. 6 C. P. 486, at p. 490. But this still involves the doctrine of election.

Further reference may be had to Shirley's L. C. Bl. (3rd Eng.) ed., secs 35, 36, and cases collected in *Brown v. Howland*, 9 O. R. 48, at pp. 53, 60, 61; *Ballantyne v. Watson* 30 C. P. 429, 540. Care must be taken in reading the judg

ment of Osler, J. I do not understand him as saying that one must sue to judgment to evidence election, but merely that if suing did not constitute an election, suing to judgment would.

Judgment.
ROSE, J.

In my opinion the motion must be made absolute to set aside the judgment against the defendant Graham, and to dismiss the action as against him.

It was objected that Devlin had not been brought before the Court on this motion. It was answered that Graham sought nothing as against him. It is possible he ought to be heard on the question of costs; or, indeed, he may have some equity to urge, which should be protected by the order. The plaintiffs' counsel said that the company would seek some relief on the question of costs as against Devlin.

I think Devlin ought in strictness to have been brought before the Court, as this judgment may, in some way affect him, although it was not suggested in what manner it could. Still, if he desire to be heard, or the plaintiff desire to bring him before the Court, the entry of judgment on this order may be stayed until the next sittings of this Court, to hear any application that may be made in the matter.

If not then spoken to, the order will go with costs.

MACMAHON, J., concurred.

[The costs were subsequently disposed of.]

[COMMON PLEAS DIVISION.]

HARKINS V. DONEY.

Defamation—Libel—Article in newspaper—Evidence of authorship—Refusal to answer as to authorship claiming privilege against criminal proceedings—Effect of.

Action of libel. The libel consisted of a letter published in a Boston, U. S., newspaper, claimed to have been written by defendant. The letter, which was signed by a person of the same name as the defendant, stated that it was written in answer to an anonymous letter, dated Sept. 15, published in the same newspaper, which the writer stated he had seen the manuscript of, and which was a clumsy attempt to make the writer believe was written further off than Ottawa, and had also seen the manuscript of a letter written by an Ottawa shoe dealer to a Boston firm, and that the handwriting of both were the same. The anonymous letter referred to a trip made by defendant to New Brunswick which was also referred to in the letter in question. The letter in question also spoke of the writer of the anonymous letter as a person who had come to Ottawa and opened a boot and shoe business, and stayed at the same hotel as the writer of the letter in question. The letter also spoke of a certain machine called the Crescent Heel Plate Machine as *our* machine. The defendant at the trial refused to answer whether or not he was the writer of the letter in question, claiming privilege on the ground that it might criminate him, and the publishers, for the examination of whom a commission issued, refused to be examined for the like reason. The defendant in his examination stated that both he and the plaintiff were boot and shoe dealers in Ottawa; that he was a subscriber and correspondent to this paper: that he had been on a trip to New Brunswick, and on his return saw the anonymous letter of 15th September in this newspaper, as also the manuscript thereof, as well as the manuscript of a letter to a Boston firm, both apparently in the same handwriting. The plaintiff's counsel stated that in addition to the above he intended proving that when plaintiff came to Ottawa, he stopped at the same hotel as defendant, that defendant was the sole agent for the Crescent Heel Plate Machine.

Held, that this was sufficient evidence to go to the jury of defendant being the author of the letter in question.

Quere, whether the refusal to answer the direct question as to authorship, or the claim of privilege against criminal proceedings, afforded any evidence thereof, by way of admission or estoppel or otherwise.

Statement.

THIS was an action of libel tried before Street, J., and a jury at Ottawa, at the Fall Assizes of 1888.

The libel was as follows:

“ To the Editor of the Boot and Shoe Recorder.

“ OTTAWA, Can., October 13th, 1887.

“ If I were to consult my own feelings, I would not reply to the poor miserable creature who penned the anonymous concoction, dated September 15th, and published in your issue of the 5th inst. But I notice he has styled himself a New Brunswicker, and has taken the unwarranted

liberty of calling my friends in New Brunswick 'fools.' Now, sir, the question is, who is this man? I think I know him. During the time that I have been known to the shoe industry as a writer, I have received a large number of complimentary letters by mail, which have encouraged me to go on and work whenever I have a spare hour; but I never have received one letter uncomplimentary or anonymous until the 15th of Sept. last. This was a most insulting one and evidently the work of a low, miserable specimen of the human race. It was a clumsy attempt to make me believe it was the work of some one farther off than Ottawa. But it so happened that I was then in possession of a scribble sent to a prominent horse in Boston, from an Ottawa shoe dealer, which was a blackmail upon one C. Doney; and this same member of the anonymous tribe asks you, Mr. Editor, who this Mr. Doney is. Well, I am not through yet, and before I get through, I will tell him who he is, and what the home market estimates him at. This Boston firm kindly mailed me the letters; and the writing of the anonymous one received by me and the Boston letter, was the same. Take note that the letter published, and the one received by me, were both dated September 15th. Now I can come to no other conclusion than that these three letters were written by one and the same man, and that man is a recent addition to the scum of Ottawa shoe trade. I send you my letter; and please inform me through "Recorder," whether, in your opinion, the same hand did not write both of them. I shall go ahead on the presumption that one man did it. Now, who is this fellow? He is a member of that large family that chews and spits tobacco in public dining-rooms, eats with a knife, and looks the very image of "Gutter Birth." He arrived in this town some time ago without a dollar of capital, and is now making desperate efforts to make people believe that his partner has \$5,000, whereas he has only \$500. His fixtures are not yet paid for, and the man who built them (a customer of mine) cannot get the money. He put up at first at the same hotel I have lived in for the past six years, and was put out in ten days for being 'objectionable to the class generally residing there.' He is now living in a boarding house at a \$16.00 per month rate.—His people's rate slightly elevated. He visited Boston sometime ago to buy goods, but I am glad to find that the Boston houses were too smart to ship them. He has been making crazy efforts all during the whole of the past summer to make the people here believe that he is in opposition to me; but finding that I have treated him in all cases with silent contempt, he goes mad, and writes to Boston firms, Boston papers, and myself anonymously.

In conclusion, Mr. Editor, I shall say that, in Ottawa 10,000 of such wretched efforts could not injure me, and in Ottawa I shall take no note of them; but to my friends in New Brunswick—who, although I was a stranger to them, received me most kindly—I think I owe an explanation. There is one more trouble that this young member of the "Gutter Tribe" has, he cannot get a Crescent Heel Plate Machine. Oh, no, sir, and he never will, for our machines will take first class men, and no other will we have. Then, to my friends in New Brunswick, allow me to say that no New Brunswicker, in my opinion, wrote that letter. Would any

Statement.

Statement. New Brunswickers say, 'Who is this Mr. Doney now perambulating among the Bluenoses?' I think not. People do not often call themselves names. The respect which I have and I owe to my friends in New Brunswick, compels me to ask you to publish the letters enclosed to you. These are a few of the encouragements I have received from all parts of the continent, one or more of the names having earned fame from within our honored industry; and these unsolicited compliments I prize most dearly. I hope these gentlemen will pardon me for allowing letters to be published that were only intended for private perusal; but I owe some defence to the gentlemen who made my visit to the Maritime Provinces so pleasant, and I trust that this cause will entitle me to their forgiveness."

"CHARLES DONEY."

The "Recorder" was published in Boston, U. S.

The defendant was examined at the trial, and refused to answer any question as to whether he was the writer, or whether he caused the publication—pleading privilege on the ground that his answers might subject him to a criminal prosecution. The publisher of the paper, to examine whom a commission had issued, refused to be examined for a similar reason.

It appeared from the examination of the defendant, that he and the plaintiff were boot and shoe dealers in Ottawa: that the defendant was a subscriber to and correspondent of the "Recorder:" that he, the defendant, had been on a business trip to the Maritime Provinces. After his return he saw in the "Recorder" a letter signed "D. C. E.," which letter was as follows:

"NEW BRUNSWICK, Sept. 15th, 1887.

"Editor 'Recorder.'"

"Will you please inform your many readers in the Maritime Provinces, who this Mr. Doney is who is now perambulating among the Bluenoses, and who delivers himself of so much nauseating stuff regarding a certain H. P., and the great people who purchase them? 'Some men are born great, others have greatness thrust upon them,' was once considered a wise saying; but according to Doney, no man can be great, or clever, or good who do not control his C. H. P. Fools can be caught with flattery better than anything else, and a promise of a "puff" in the "Recorder," has caught several leading (?) dealers. Doney plays it well, and we have no great objection to his doing so, but we do object, as readers of the "Recorder," to perusing such voluminous bombast. Mr. Doney, we are all tired. Please give us a rest. (Please publish.)

"Yours,

"D. C. E."

He further stated, that after seeing this, or possibly before its publication, the manuscript letter, purporting "to be the manuscript of the letter which is published referring to my trip to the Maritime Provinces," was received by him from the office of the "Recorder:" that it was sent to the "Recorder" from Canada. The manuscript was produced, and was in terms identical with the letter published and above referred to. Statement.

He further stated that he had received from the same paper, the "Recorder," a postal card in apparently the same handwriting as the letter sent to them from Ottawa, and which was as follows :

OTTAWA, Can., April 23.

"President Crooks would like to know from C. Doney, the Keely Motor of the "Recorder," why it is the respective Mercantile Agencies do not rate him according to his wind. Are his financial bellows inferior to his physical?"

He was going on to offer his opinion that the letter and postal card were in the plaintiff's handwriting, when he was stopped on objection taken by the plaintiff's solicitor, as to his means of knowledge. In answer to the question as to how he knew it was sent from Canada, he said "I have no more knowledge than this, that the paper was headed 'New Brunswick,' and the envelope was stamped 'Ottawa.'"

Amid objections, the defendant was pressed by his counsel as to his knowledge of the plaintiff's handwriting, and was asked the following questions: "Q. That letter in your custody, was it a letter to you—the letter that you saw? A. The letter that I saw was sent to me, at least it was not sent to me from T. P. Haskin & Company. Q. And what became of it? Where is it now? A. It is not in Canada; it may not be in existence. Q. How long ago was that? A. That would be about twelve months ago. Q. And how long is it since it has been in Canada? A. I don't think it had been in Canada for the last—well, I don't think it was in Canada one day when it came to me. Q. It was returned at once? A. Yes."

Statement. On cross-examination he stated that the letter above referred to was sent to him from Whitmore Bros., a prominent firm in Boston.

The defendant then produced a letter and postal card, which were sent to the "Recorder," from Ottawa, and to which the writer of the alleged libel referred and answered in such document.

He also admitted having received from a prominent firm in Boston, a letter signed by Larkin & Co., and which he returned at once to the firm in Boston.

His counsel offered to prove that the letter he received from Whitmore Bros., and the letter produced, dated the 15th of September, were in one and the same handwriting.

The learned Judge entered judgment for the defendant, and dismissed the action, with costs, on the ground that publication of the libel had not been proved.

In Michaelmas Sittings, 1888, a motion was made on behalf of the plaintiff to set aside the judgment entered for the defendant, and for a new trial.

In the same Sittings, *McVeitty* (of Ottawa) supported the motion, and referred to *Dominion Telegraph Co. v. Silver*, 10 S. C. R. 238-255; *Johnson v. Hudson*, 7 A. & E. 233n; *Fryer v. Gathercole*, 3 Ex. 262; *Scott v. Crerar*, 14 A. R. 152; 11 O. R. 541, 560.

Aylesworth, contra, referred to *Lamb v. Munster*, 10 Q. B. D. 110; Taylor on Evidence, 8th ed., secs. 1454, 1467; *Millotte v. Little*, 10 P. R. 265; *Power v. Ellis*, 6 S. C. R. 1.

December 22, 1888. ROSE J.:—

In the article complained of, it will be observed that the writer states that he had a letter, received from a Boston firm, which was in the same handwriting as the anonymous letter; and that the letter published and the anonymous letter received by the writer, were both dated the same day, viz., the 15th of September; and the writer believed that both were written by the same man.

The original manuscript of the letter of 15th of September, published in the "Recorder," is produced at the trial; and the defendant offers to prove, and hence admits that it was in the same handwriting as the letter received by him from the Boston firm, and therefore in the same handwriting as the anonymous letter received by the writer of the alleged libel.

Surely here are facts which could not be properly withheld from the jury as tending to shew that the defendant and the writer of the alleged libel were one and the same person.

The writer of the libel said, "I have received a letter from a prominent Boston firm, which is in the same handwriting as an anonymous letter received by me."

The defendant says, "I received a letter from a prominent Boston firm, which was in the same handwriting as a manuscript letter which I now produce, and which was sent to me by the "Recorder."

From these and other facts detailed, it is a probable inference that the letter sent by the Boston firm to the writer of the libel, and that sent to the defendant, are one and the same letter.

The defendant offers to prove, and therefore admits, that the manuscript letter and the letter received from Boston, were in the plaintiff's handwriting; therefore there is evidence as against the defendant that the anonymous letter and the manuscript letter were in the plaintiff's handwriting.

It was objected that the manuscript of the article was not produced, nor foundation laid for secondary evidence; but, in my opinion, that was not necessary. If the defendant, upon being shewn the article as it appeared in the "Recorder," had admitted he was the author of it, and had sent it for publication, such evidence would have been sufficient; and it seems to me he has admitted such facts as are inconsistent with any other theory than and will warrant the conclusion that he was the author of the letter, and sent the same for publication to the "Recorder."

Judgment.

Ross, J.

Judgment. See Blackstone ed. of Taylor on Evidence, 8th ed., secs. 410, 1463; *Regina v. Beere*, 12 Mod. 219, 221, 1 Ld. Raym. 414.
 ROSE, J.

Add these facts to those already appearing as above stated, and I think the case should have been submitted to the jury.

The following is what counsel stated he had to offer in addition to what already appeared in evidence, and the ruling of the learned Judge thereon :

“MR. McVEITY.—I can just state all the evidence I have to give on that point. I intend to show by the plaintiff that he is in business here : that at the time of the writing of the alleged libel, he had only been a short time in business : that when he first came here he went to board at the Windsor Hotel, the same hotel that the defendants boarded at : that the defendant was boarding there at the time ; there was a controversy between this plaintiff and a prominent firm in Boston, alluded to in the alleged libel, with respect to a certain article of merchandize. I am going to show that Mr. Doney, the defendant, is the sole agent and vendor of a contrivance called the Crescent Heel Plate, alluded to in the alleged libel ; and I am going to show by another witness, who was at one time connected with the “Boot and Shoe Recorder,” and who has solicited subscriptions for them, and is well acquainted with the paper, that he read this in the issue of the “Recorder,” in the office of the paper in Boston—not the original, but that he read it in the newspaper : that the defendant is a contributor to the paper : that he is the only person of that name in the city ; and that he has contributed before and since.

THE COURT.—None of these circumstances, nor the whole of them combined, would, in my judgment, amount to any proof of publication by the defendant of this libel ; because the libel is charged as having been a written document without either producing it or accounting for it in some way. That you have been unable to do, and being unable to do that, you cannot prove the publication of the libel by the defendant.

MR. McVEITY.—I wish to cite in support of my position, the cases of *Johnston v. Hudson*, 7 A. & E. 233a; *Fryer v. Gathercole*, 4 Ex. 262; *Scott v. Crerar*, 14 O. R. 152; *Dominion Telegraph Co. v. Silver*, 10 S. C. R. 238, and *Odger's Libel and Slander*, 8th ed., 562.

THE COURT.—I have already stated my view of the evidence that has been offered, and you propose to offer, and I see no reason for altering the view I took.”

It becomes unnecessary to consider whether, apart from the evidence as to the letter, the circumstantial evidence was sufficient. I am not satisfied that it was not, but have not formed any decided opinion.

We are also in the above view relieved from considering the very interesting question as to whether the refusal to

answer the direct questions as to authorship, afforded any evidence by way of admission or estoppel or otherwise, that would justify the jury in saying : " If you are not the author—if you had nothing to do with the publication—you cannot in anywise be put in peril of criminal proceedings by any answer you may give ; and therefore we will judge you by your refusal and your reason therefor." Such a ruling would probably fully protect a witness from the peril of criminal proceedings founded upon an answer, and at the same time leave him open to the fair and reasonable conclusion to be drawn from his conduct.

Judgment.
ROSE, J.

I would suggest that the " Evidence Act " be amended, so as to compel witnesses to disclose the truth, and protect them from any criminal proceedings which might otherwise be founded upon their admissions.

Those interested in pursuing the discussion which has been continued through many years, may refer to Taylor on Evidence, Blackstone, 8th Eng. ed., vol. ii., sec. 1455 ; 2 Phillips on Evidence, 10th ed., p. 501, citing *Rose v. Blakemore* 1 R. & M. 384 ; *Rex v. Watson*, 2 Stark. 153, 157.

There should be a new trial ; costs in the cause to the plaintiff in any event, both of the former trial and of this motion.

GALT, C. J., and MACMAHON, J., concurred.

Motion allowed.

[COMMON PLEAS DIVISION.]

SHERWOOD V. CLINE.

County Courts—Claim within jurisdiction of—Prohibition.

Where, in an action in the County Court, judgment is given for a sum in itself within the jurisdiction of the Court, but which is the balance of a sum beyond the jurisdiction, and which was arrived at not by any settlement or statement of account between the parties, but as the ascertainment of a disputed account.

Held, this was the allowance of a claim beyond the jurisdiction of the Court, and a writ of prohibition was granted.

Statement.

THIS was a motion by way of appeal to the Divisional Court from an order of Galt, C. J., refusing a motion for a writ of prohibition.

During Michaelmas Sittings, 1888, the motion was argued.

Aylesworth, in support of the motion.

Strathy, contra.

December 22, 1888. ROSE, J. :—

The action was brought in the County Court of the county of Simcoe to recover from the defendant \$280, being the amount of two notes received by him from one John Sullivan, for a piano sold by the defendant on account of the plaintiff.

The agreement between the plaintiff and the defendant was alleged to have been that, if he sold the piano for notes, the notes were to be made payable to the plaintiff, and the plaintiff was to pay the defendant his commission on the sale, amounting to \$20.25.

Demand and refusal were alleged.

The defendant set up a sale to him of the piano; but the jury found against this contention; and the jury further found a demand of the notes before action.

The plaintiff further admitted a balance due by the plaintiff to the defendant for commission on various sales

of musical instruments, after deducting \$175 cash paid to the defendant, and goods to the value of \$25 received by him on the plaintiff's credit.....	\$16 65	Judgment.
And other items amounting to.....	17 00	Loss, J.
	<hr/>	
	\$33 65	

As I understand this, it means that the defendant was entitled to credits amounting to \$233.65, less \$200 paid to him in cash and goods.

The plaintiff then claimed "from the defendant payment of the amount due the plaintiff in respect of the said piano, after giving the defendant credit for his commission on the same, and the other credits before mentioned."

The plaintiff's claim thus appeared to be—

	CR.		DR.		
	\$280 00		\$20 25	=	\$259 75
And	200 00		233 65	do. bal.	33 65
	<hr/>		<hr/>		<hr/>
Totals.	\$480 00	less	\$253 90	=	\$226 16

The defendant denied the allegations contained in the plaintiff's statement of claim; and claimed by way of counter-claim or set-off \$264.08, being a balance of \$648 33 Less credits 384 25

\$264 08

At the trial the jurisdiction of the Court was disputed, and the plaintiff was allowed to amend his claim so as to make it read, "the plaintiff claims \$200."

The jury made special findings, the material ones of which, so far as this motion is concerned, have been referred to.

When the case came on for trial on the 16th December, 1887, and upon the question of jurisdiction being raised before the amendment had been asked for, the learned Judge, William Boys, Esq., after consideration, stated that his decision must be against the jurisdiction—whereupon, as I find it noted, Mr. Strathy applied to be allowed to

Judgment. amend his statement of claim as above set out. The
Ross, J. learned Judge in allowing the amendment, stated that if the evidence shewed that the claim was really over \$200, and only reduced by a set-off, he would then be obliged to hold that there was no jurisdiction—or at all events that the set-off must be deducted from the \$200 as claimed.

He further held that the claim as set out in the statement of claim, was the one to be tried, and that the particulars on the writ could not be considered. Further, that by the statement of claim, the cause of action was not settled between the parties; that there never was a time when the parties were agreed upon what was due by one to the other. After some further observations, the learned Judge noted, "under this ruling the case goes on, subject to the objections raised and to my allowing the amendment."

Evidence was then taken when certain questions were left to the jury, subject to the objections raised on behalf of the defendant.

Upon the findings, it was "referred to Mr. Stephenson the clerk of the Court, to take the account, and judgment was reserved until after his report."

On the 3rd of February, 1888, the referee made his report as follows :

1. "That the defendant sold as agent for the plaintiff, a number of pianos and organs, and that the defendant on the sales, directly or indirectly, effected by him, was to be paid, as a commission, half of the actual profit receivable by or accruing to the plaintiff on the sales made.

2. I find that, in calculating such profit, the wholesale price of the instruments sold, with freight and costs of stool, book, and cover, (if any), were together to form the cost price of the instrument; and that when the instrument was sold on credit terms, the plaintiff in calculating the retail price for the purpose of ascertaining the profit, was to be allowed to deduct from such retail price, or to add to such cost price," 10 per cent. per annum on unpaid moneys.

"3. That the defendant was to share in the loss on the sale of any instrument only to the extent of his commission."

Judgment.

Rose, J

4. He then found that the defendant's profit on eleven sales, was \$227.23 : that he, the defendant, had received \$183.50 in cash from customers on account of his profits, and \$22.50 in goods from one Archer on the purchase price of one of the said eleven sales ; and he then found that the balance to the credit of the defendant on account of commission, was \$21.23.

5. He further found that the two sums of \$183.50 and \$22.50 were retained by the defendant on account of commission ; and that the plaintiff, when such fact came to his knowledge sometime before the bringing of this suit, did not object thereto.

6. He found the defendant entitled to charge against the plaintiff \$13.41 for freight, cartage, &c.

"7. I find that the defendant sold a piano to one John Sullivan for the sum of \$280, payable according to notes taken therefor to the defendant, and which he has parted with to a third party for value—\$60 in six months ; \$220 in eighteen months ; and that the cost price of said piano including the 10 per cent discount on said notes for the time they had to run, is \$240.60.

"8. I have allowed the plaintiff the sum of \$200 as the amount that he is entitled to claim against the defendant in respect of said piano sold to Sullivan, over and above any commission (if any) to which the defendant is entitled on the sale of the same."

I confess I am quite unable to understand how the sum of \$200 was arrived at, unless that the plaintiff's counsel consented to such a finding with a desire to keep the sum he would recover within the amount of his amended claim.

"9. I find as the result of the foregoing findings that the defendant is indebted to the plaintiff in respect of the matters of account in the pleadings mentioned and referred to me, in the sum of \$165.36."

Judgment.

ROSE, J.

As I understand it, the referee found for the plaintiff on his claim the sum of \$200 in respect to the Sullivan piano; and for the defendant on his set-off or counter-claim, \$227.23 for profits, less \$185.50 and \$22.50, *i. e.*, \$206, leaving a balance of \$21.23, to which he added \$13.41 = \$34.64. This sum he deducted from the \$200, leaving the balance of \$165.36.

He found specially that the sum of \$183 was composed of \$100 from one Cooper; \$75 from one Brown, and \$8.50 from one Brundage on account of sales made by him as agent for the plaintiff; being three of the eleven above referred to.

On this report, the learned Judge gave judgment for the plaintiff for \$165.36; and this is an appeal from the judgment of the learned Chief Justice of this Division, refusing a motion for a writ of prohibition.

It is clear, that on the plaintiff's statement prior to the amendment, in order to investigate and arrive at the true balance of account and amount of claim, it would have been necessary to consider and determine the right of the plaintiff to recover the proceeds of the notes obtained upon the sale of the piano to Sullivan, to wit: the sum of \$280, less the defendant's commission or share of the profits, *viz.*, \$20.25, the balance being \$259.75.

Also to investigate the account of commissions due to the defendant, *viz.*, \$216.65, and other items amounting to \$17, in all, \$233.65; and the various sums received by the defendant of moneys belonging to the plaintiff, named by the plaintiff at \$175; and an item of goods charged against the defendant of \$25.60. The account thus made up would be for an unliquidated sum of \$480.60, with credits to the amount of \$233.90—balance \$226.10, as above set out.

As amended the claim was reduced to a balance of \$200 instead of \$226.10, this is by the plaintiff giving credits.

As to his right to thus give jurisdiction we will consider later.

The first question is, could the amendment properly have

been made, if its effect would have been to bring within the jurisdiction a claim which the record shewed was without or beyond the jurisdiction? And, second, Did the amendment, if properly made, bring the case within the jurisdiction?

Judgment.

ROSE, J.

Many cases have been cited upon the question of allowing such an amendment. *Jordan v. Marr*, 4 U. C. R. 53, is one of those which are opposed to the nature of such power to amend. At p. 59, Robinson, C. J., said: "But the objection here is not that the plaintiff has failed to shew in his declaration all that is necessary to sustain the jurisdiction; but the argument is, that it does appear upon the face of his declaration that he is suing for a demand beyond the jurisdiction of the Court. If that does certainly appear, it must follow no doubt that the whole case is *coram non judice*; that is a consequence which must be admitted to follow as well now as at an earlier period of our law; for where the legislature has clearly marked out the line within which a new jurisdiction is to act, it cannot be otherwise but that its proceedings, whenever it goes beyond that line, must be looked upon as wholly unauthorized and void." He refers to *Dempster v. Purnell*, 1 Dowl. N. S. 168, as clear upon that point. See also pp. 61 and 67.

So, also, the other members of the Court. Macaulay, J., thought the declaration bad as on its face exceeding the jurisdiction of the Court, in this differing from Robinson, C. J., and Jones, J.

The latter Judge said, at p. 79: "If it appeared clearly upon the face of the declaration that the claim was beyond the jurisdiction of the Court, we must arrest the judgment."

In *Re Hopper v. Warburton*, 32 L. J. N. S. Q. B. 104, Mellor, J., at p. 105, said: "The foundation of the jurisdiction is that upon which the defendant is called upon to appear, and on which in this case he did appear. If the particulars shew a case which is not originally within the jurisdiction of the County Court Judge, no amendment by him can bring it within his jurisdiction."

Judgment.**Ross, J.**

That case is referred to in *Shrott* on Informations, Mandamus, and Prohibition, Bl. ed., 489, and as is also *Re Hill*, 10 Ex. 726, to which reference may be had.

In *Thomas v. Hilmer*, 4 U. C. R. 527, the verdict was in excess of the jurisdiction, and an entry of *remittitur damna*, was permitted on the following ground, viz: "As the plaintiff laid his action, it was clearly within the jurisdiction of the Court:" p. 525.

In *Davidson v. Belleville and North Hastings R. W. Co.*, 5 A. R. 315, where an amendment of particulars was allowed, it was held that they were no part of the record; and *per* Patterson, J. A., at p. 320: "The record shewed no excess of jurisdiction."

In *Clegg v. Baretta*, 75 L. T. N. S. 775, an action for delivery of a deposit note for £65 detained by the defendant, it was held that its value being merely the amount represented by the cost and trouble the plaintiff would be put to in proving his title to the money in the event of the note being withheld, the Court had jurisdiction.

The Court, Day and Wills, JJ., distinguished it from an action to recover a note worth £65 to the plaintiff, when, as said by Wills, J.: "No act of his," the plaintiff, "could have reduced the damages, and thus made it of a value within the jurisdiction of the County Court."

Mr. Strathy cited as an authority in his favor *Greenizen v. Burns*, 13 A. R. 481. That was a County Court appeal. There the claim was for \$400 and interest. The words, "with interest," were allowed to be struck out at the trial. Patterson, J. A., delivered the judgment of the Court; and, at p. 484, he said: "Interest beyond the \$400 would have been recoverable only as damages, and could not have been given in the County Court. The amendment was probably advisable in order to avoid the appearance of a claim in excess of the jurisdiction of the Court, and for that purpose may be said to have been necessary; but it was a little more than a formality. The claim for damages beyond the jurisdiction is certainly not more serious than an actual assessment of such damages would

have been, and that was held to be curable in times long before our present more liberal system was inaugurated: *Thomas v. Hilmer*, 4 U. C. R. 527." Judgment.
ROSE, J.

I have referred to *Thomas v. Hilmer*; and, with great respect, it seems to me that case shews that a claim on the record beyond the jurisdiction, is more serious than an assessment for the same amount.

To quote the words of Robinson, C. J., at p. 528: "As the plaintiff laid his action, it was clearly within the jurisdiction of the Court. * * All that can be said is, that in an intermediate stage of the proceedings something was done which it was illegal to do."

The cases of *Joyce v. Hart*, 1 S. C. R. 321, and *Levi v. Reed*, 6 S. C. R. 482, may be referred to as to the claim on the record governing the jurisdiction.

Were it necessary to determine whether the learned Judge had the power to make the amendment, it would be necessary to carefully consider the following cases; *Fitzsimons v. McIntyre*, 5 P. R. 119, and cases there cited. *Re Higginbotham v. Moore*, 21 U. C. R. 326; *Re McKenzie and Ryan*, 6 P. R. 323; *Re Stogdal and Wilson*, 8 P. R. 5; *Vogt v. Boyle*, 8 P. R. 249; *Davidson v. Belleville and North Hastings R. W. Co.*, 5 A. R. 315, 317; *Meek v. Scobell*, 4 O. R. 553; *Re Walsh v. Elliott*, 11 P. R. 520; *White v. Gilchrist*, 12 P. R. 573, and *Little v. Comstock*, Bound App. Cas., November and December, 1887, Judge's Library, unreported.

It is a little difficult to see how a Judge who upon looking at the record sees that the claim is beyond his jurisdiction has anything further to do with the matter except to refuse to try it. He sees that the parties have endeavored to bring into Court a claim which the statute prohibits. If he allows an amendment he is asserting jurisdiction at a moment when he has none, and by a physical act is changing the face of the record so as to present an entirely different claim. If the paper writings then before the Court were permitted to be used to evidence a new claim, would not the suit be new?

Judgment.

ROSE, J.

But it is not, in my opinion, necessary to decide the question as it seems to me that the judgment as finally rendered was really an allowance to the plaintiff of a claim beyond the jurisdiction of the Court.

It will be seen that the result is as follows :

The plaintiff has been allowed—

1. For sale to Sullivan	\$200 00
2. " " Cooper	100 00
3. " " Brown	75 00
4. " " Bumdage	8 50
5. " " Archer, goods	22 50
	<hr/>
	\$406 00

The defendant has been allowed—

Half of profits on sales	\$227 23
Freight, &c.	13 41
	<hr/>
	240 64

Balance, amount of judgment\$165 36

The record, as amended, claimed \$200. The antecedent clauses shewed this claim to be a balance of account, as I have before pointed out, with a debit side of \$480, and a credit of \$253.90; balance \$226.10, and an abandonment of the \$26.10.

It is clear from *Re Furnival v. Saunders*, 26 U.C.R. 119, at p. 122, that, "A plaintiff cannot by giving a defendant credit for a set-off compel him to set it up, nor can he by giving credit for it at the outset give the County Court jurisdiction."

The sum of \$253.90 was not a payment nor was it a set-off which the parties agreed should be taken as payment; nor was the balance of \$226.10, nor the balance of \$200 an amount liquidated and ascertained by the act of the parties. The statement of defence shews that the defendant claimed a much larger sum, and the finding of the referee was not on the footing of an account stated. It was the ascertainment of a disputed account. See, also, *Fleming v. Livingstone*, 6 P. R. 63.

There has been an ingenious attempt to make it appear on the statement of claim that the only claim was for the proceeds of the instrument sold ; but that does not appear to me to be the fair result of the language used. Before the referee the plaintiff apparently abandoned some \$40 from the price obtained for the Sullivan piano. This probably he may obtain in future proceedings, less the defendant's share of the profit, if he is so entitled.

Judgment.
ROSE, J.

I think judgment must go granting the writ. The appeal will be allowed, and I suppose with costs against the plaintiff.

I may note that I have been unable to assist the plaintiff even by the application of the most liberal construction of the statute as found in *Vogt v. Boyle*, 8 P. R. 249. That case has been considered in *McLaughlin v. Schaefer*, 13 A. R. 253, and referred to *Meek v. Scobell*, 4 O. R. 553, and in *Re Walsh v. Elliott*, 11 P. R. 520.

Since writing the foregoing, my attention has been called by my learned brother Osler, to the case of *Broad v. Perkins*, 21 Q. B. D. p. 533, as to the jurisdiction of the Court to refuse a writ of prohibition. There it was held that when the defect is not apparent and depends on some fact within the knowledge of the applicant who did not raise it in the Court below, but allowed the case to proceed to judgment, the Court might refuse the writ. The proposition given there at greater length, may be found in *Mayor of London v. Cox*, L. R. 2 H. L. 239, at p. 283.

This does not, however, apply to the facts of the present case where the point was raised at the trial ; and the learned Judge decided to allow the plaintiff to proceed subject to the objection.

MACMAHON, J., concurred.

[COMMON PLEAS DIVISION.]

BOYD ET AL. V. NASMITH.

Banks and Banking—Cheque—Marking “Good” by Bank—Effect of when payment not demanded—Discharge of drawer.

The payees of a cheque took it to the Bank on which it was drawn on the afternoon of the day on which they received it from the drawer and got it marked “good,” the amount being charged to the drawer’s account. They then took it away without demanding payment. The Bank, on the evening of the same day, suspended payment, and on the following day, on presentation of the cheque payment was refused. *Held*, that the drawer of the cheque was discharged from all liability thereon.

Statement. THIS action was tried before Street, J., without a jury, at Toronto, at the Spring Assizes of 1888.

The learned Judge reserved his decision and afterwards delivered the following judgment :

May 14, 1888. STREET, J.—The plaintiffs are solicitors practicing in Toronto. On the 15th November, 1887, the defendant completed the purchase from a client of the plaintiffs of a piece of land in Toronto, and gave the plaintiffs in payment his cheque for \$2,500 on the Central Bank of Canada, Toronto. Between two and three o’clock on the same day the plaintiffs presented the cheque at the Central Bank, and at their request it was marked “good,” and offered to the Canadian Bank of Commerce by the plaintiffs, at a few minutes before three o’clock, as part of a deposit which they were making there. The Canadian Bank of Commerce refused to receive the cheque, and upon the same afternoon, at five o’clock, the Central Bank, which had continued to pay up to that time, closed its doors, and suspended payment. At the time of making the cheque the clerk of the Central Bank, who had marked it, charged the amount of it to the defendant’s account in the bank ledger in accordance with the usual custom of the bank when cheques are marked “good.”

On the 16th November the plaintiffs presented the cheque at the office of the Central Bank for payment, but payment was refused because the bank had then suspended; and the cheque was protested for non-payment.

The question in the present case is, whether the defendant is liable either upon the original consideration (supposing the right to recover it to have become vested in the plaintiffs), or upon the cheque; and I am of opinion that he is not.

Judgment.

STREET, J.

The original consideration cannot be resorted to under the circumstances, unless the contract of the defendant, the drawer of the cheque, has been broken. There was an implied contract between him and the payee, when the payee took the cheque, that the bankers would pay it forthwith upon demand, if it were presented within a reasonable time. It was the duty of the payee to present it for payment within a reasonable time, which the law has fixed as being not later than during the banking hours upon the following day. The duty of the bankers, as between themselves and the drawer, was to pay the amount of the cheque upon presentation, because they had in their hands funds to meet it. The payee had no right, as between himself and the drawer, to present the cheque for any other purpose than payment. He was not bound to present it until the following day, and had he not presented it until then, the drawer would have been liable; but he chose to present it the same day, and, instead of payment, to take the bankers' undertaking to pay upon a further presentation. By doing so he has discharged the drawer, in my opinion. There has been no breaking of the drawer's implied contract. The banker was ready and willing to pay the cheque when it was presented, and the drawer's undertaking was satisfied, and the cheque was honoured when it was presented under those circumstances. When it was presented upon the following day payment must be taken to have been demanded not upon the drawer's original contract, but upon the promise to pay of the bankers which the plaintiffs had procured to be substituted for it.

It is argued that because payment was not demanded when it was first presented, therefore the cheque was not then presented for payment; but the payee had no right to present it except for payment; and the result of his having presented it was that the defendant was charged in the bank books with the amount of the cheque, and was prevented from withdrawing the funds at his credit on the books of the bank to the amount of the cheque.

I think the action must be dismissed, with costs.

See *Goodwin v. Roberts*, L. R. 10 Ex. 351, 352; *First National Bank of Jersey City v. Leach*, 52 N.Y. 350; *Daniel*

Judgment. on Negotiable Instruments, 3rd ed., secs. 1604, 1627,
STREET, J. *et seq.*

In Easter Sittings, 1888, a motion was made to set aside this judgment, and to enter judgment for plaintiffs.

During Michaelmas Sittings 1888, *Mowat*, Q.C., Attorney-General, supported the motion, and referred to *Robson v. Bennett*, 2 Taunt. 382, 388; *Boehm v. Sterling*, 2 T. R. 422, 2 Esp. 574; *Barnet v. Smith*, 10 Foster N. H. 256; *Bickford v. First National Bank of Chicago*, 42 Ill. 238, 242; *Brown v. Leckie*, 43 Ill. 497, 500.

MacLaren, contra, referred to Byles on Bills, 13th Eng. ed., 22; 6 Amer. ed., secs. 20, 22; *Daniels v. Kyle*, 1 Georgia 304; Daniel on Negotiable Instruments, 3rd ed., 1601 a; *First National Bank of Jersey City v. Leach*, 52 N. Y. 350; *Nightingale v. City Bank*, 26 C. P. 74.

December 22, 1888. GALT, C. J.:—

I was a little surprised when the learned Attorney-General stated there was no English or Canadian authority expressly bearing on the case, but a careful examination satisfies me he was correct.

We must then consider it; and, in doing so, I quote the words of Cockburn, C.J., in *Goodwin v. Roberts* in delivering the judgment of the Court of Exchequer Chamber, L. R. 10 Ex. 337, at p. 351:

“Another very remarkable instance of the efficacy of usage is to be found in much more recent times. It is notorious that with the exception of the Bank of England, the system of banking has recently undergone an entire change. Instead of the banker issuing his own notes in return for the money of the customer deposited with him, he gives credit in account to the depositor, and leaves it to the latter to draw upon him, to bearer or order, by what is now called a cheque. Upon this state of things the general course of dealing between bankers and their customers has attached incidents previously unknown, and these by

the decisions of the Courts have become fixed law. Thus, while an ordinary drawee, although in possession of funds of the drawer, is not bound to accept unless by his own agreement or consent, the banker if he has funds is bound to pay on presentation of a cheque on demand." Judgment.
GALT, C.J.

The question now before us has been expressly decided in the case of *First National Bank of Jersey City v. Leach*, 52 N. Y. 350, by the unanimous judgment of the Supreme Court of New York; and, singular to remark, the learned Judge who delivered the judgment, in conclusion says, at p. 353:

"I am not aware of any direct authority upon this question; but upon principle it must be held that the bank holds the money, after certification to the holder, not at the risk of the drawer, but of the holder of the cheque."

This judgment was given in April, 1873.

In the third edition of Daniel on Negotiable Instruments, published in 1882, sec. 1601a: "By certifying a cheque the bank becomes the principal and only debtor; the holder by taking a certificate of the cheque from the bank, instead of requiring payment, discharges the drawer."

The law is settled that a person to whom a cheque is given is not bound to present it the day on which it is drawn, but must, if he resides in the same town as the bank is situate, do so on the next; he may, however, do so at once as was done in this case, and it appears to me that if he does, and in place of demanding payment he obtains a certificate, he elects to give credit to the bank, and not to the drawer.

I agree with the learned Judge that the defendant is entitled to judgment.

MACMAHON. J. :—

The present case is one of much interest as we are for the first time called upon to consider the question whether the payee of a cheque by presenting it at the bank upon which it is drawn, and having it marked "good"—the amount of such cheque having been debited

Judgment.
MACMAHON,
J.

by the bank to the drawer's account at the time it was marked—has, as between himself and the drawer, discharged the latter from all liability on the cheque.

What a cheque is, and what is its province in commercial and banking transactions, was recently discussed by Lord Blackburn in *McLean v. Clydesdale Banking Co.*, 9 App. Cas., 95, who, after defining what a bill of exchange is, says, at p. 106: "That definition completely embraces in it a cheque. A cheque is such an order: an unconditional order in writing addressed to a banker requiring him to pay a sum certain in money at a fixed or determinable future time, that is to say, on presentation; and coming within that definition it would clearly be a bill of exchange. Why should a cheque not be a bill of exchange? No reason whatever, that I am aware of, can be assigned for its not being so."

And at page 107, the same learned Judge says: "Looking at the thing according to reason and sense it would appear that a bill of exchange, or a cheque drawn upon a banker, should be in all respects equally negotiable as if it were not drawn upon a banker, but were drawn upon some one else. Accordingly it has repeatedly been so held in England, and I do not think that is disputed. The case in which that was positively decided in England was the case of *Keene v. Beard*, 8 C. B. N. S. 372."

In *Keene v. Beard*, Erle, C. J., at p. 380, says: "A cheque is strongly analogous to a bill of exchange in many respects. It is drawn upon a banker; and, though in practice the banker does not accept the draft, he might for all I know do so."

And Byles, J., at p. 381, says: "I conceive that a cheque is in the nature of an inland bill of exchange payable to the bearer on demand. It has nearly all the incidents of an ordinary bill of exchange. In one thing it differs from a bill of exchange; it is an appropriation of so much money of the drawer's in the hands of the banker upon whom it is drawn, for the purpose of discharging a debt or liability of the drawer to a third person; whereas, i

is not necessary there should be money of the drawer's in the hands of the drawee of a bill of exchange." Judgment.

Sir George Jessel, M.R., in giving judgment in *Hopkinson v. Forster*, L. R. 19 Eq. 74, at p. 76, said: "A cheque is clearly not an assignment of money in the hands of a banker; it is a bill of exchange payable at a banker's. The banker is bound by his contract with his customer to honour the cheque, when he has sufficient assets in his hands; if he does not fulfil his contract he is liable to an action by the drawer in which heavy damages may be recovered if the drawer's credit has been injured. I do not understand the expressions attributed to Mr. Justice Byles in the case of *Keene v. Beard*: but I am quite sure he never meant to lay down that a banker who dishonours a cheque is liable to a suit in equity by the holder."

MACMAHON,
J.

If Mr. Justice Byles by saying that a cheque "is an appropriation of so much money in the hands of a banker * * upon whom it is drawn," meant that it was an assignment of that much money in the hands of the banker in favour of the payee of the cheque, then according to Sir George Jessel's view that cannot any longer be considered as law. And our own Courts followed the Master of the Rolls in the opinion thus expressed in *Lamb v. Sutherland*, 37 U. C. R. 143, and *Caldwell v. Merchants Bank of Canada*, 26 C. P. 294.

The argument addressed to us by the Attorney General on behalf of the plaintiff was: that a cheque being a bill of exchange with the incidents of the latter attached to it, that marking the cheque "good" was merely equivalent to acceptance, and that such an acceptance is not payment. That having presented the cheque for payment on the day after its receipt from the defendant—that being the time within which by the law merchant they are allowed to present it—and on non-payment they were entitled to protest it, and look to the drawer.

Another point urged by counsel for the plaintiffs was that the banker, even if in funds to pay the cheque, is not obliged to pay the payee; and, if he refuse to pay, the

Judgment. holder has no right of action against the banker. And that
MACMAHON, the recourse of the holder of the cheque is against the
J. drawer, if the banker refuses payment.

This latter contention is no doubt correct as to an uncertified cheque upon the authority of *Hopkinson v. Forster*, L. R. 19 Eq. 74, and the other cases above cited.

As to the other point raised on behalf of the plaintiffs that marking the cheque "good" by the bank at the instance of the plaintiffs was merely equivalent to an acceptance of a bill of exchange, and so the holders by presenting the cheque for payment upon the following day, and payment being refused, they had their remedy against the drawer, is a question upon which there is a decided conflict of authority in the United States, where the practice of marking cheques by the banks upon which they are drawn is very much resorted to.

The Attorney General referred us to the case of *Bickford v. First National Bank of Chicago*, 42 Ill. 238, decided in 1866. In that case a cheque was drawn, certified, and deposited in a bank before three o'clock, and on the next morning it was taken in the usual course of business to the bank upon which it was drawn. The bank was closed and continued so. The cheque was protested for non-payment, and due notice given. It was held that this was sufficient diligence to hold the drawer.

The Court, in giving judgment, after stating its opinion that the legal effect of an uncertified cheque of "a depositor upon his banker, delivered to another for value," is "to transfer to that other the title to so much of the deposit as the cheque calls for," then proceeds to consider the effect of certification of a cheque by a bank; and the difference between the two kinds of cheques is thus stated by the Court, at p. 241. "There may be said to be this difference between a certified and an uncertified check: in the former description, the amount of the check is supposed to be once charged up against the drawer, so that he can no longer control the fund on which it is drawn, or rather so much of it as is specified in the check. After being

charged, it is no longer his money but the money of the holder of the check. It is not so with an uncertified check. A party having a \$1000 on deposit with a bank, may give A a check for the amount, and before A presents it, he may be anticipated by B, who has also a check on which he has drawn the money. One effect, then, of a certified check is to inspire confidence that it is drawn on an existing fund in good faith, and is no longer under the control of the drawer, the supposition being that it was charged by the bank to the drawer in his account as paid, which, however, was not done in the case before us."

Judgment.
MACMAHON,
J.

The case of *Brown v. Leckie*, 43 Ill. 497, decided in 1867, went further than *Bickford v. First National Bank of Chicago*, *supra*, by deciding that it can make no difference if the holder is charged with the amount of the cheque when the drawee endorses it "good."

See also *Barnet v. Smith*, 10 Foster N. H. 256.

After the decision in the Illinois Courts above referred to, the question came before the Supreme Court of the United States in 1870, in the case of *Merchants Bank v. State Bank*, 10 Wallace 604, the Court in giving judgment said, at p. 647: "By the law-merchant of this country the certificate of the bank that a check is good is equivalent to acceptance. It implies that the check is drawn upon sufficient funds in the hands of the drawee, that they have been set apart for its satisfaction, and they shall be so applied whenever the check is presented for payment. It is an undertaking that the check is good then, and shall continue good, and this agreement is as binding on the bank as its notes of circulation, a certificate of deposit, payable to the order of the depositor, or any other obligation it can assume. The object of certifying a check, as regards both parties, is to enable the holder to use it as money. The transferee takes it with the same readiness and sense of security that he would take the notes of the bank. It is available also to him for all the purposes of money. Thus it continues to perform its important functions until in the course of business, it goes back to the bank for redemption and is extinguished

Judgment.
 MACMAHON,
 J.

by payment. * * In well-regulated banks the practice is at once to charge the check to the account of the drawer, to credit it 'in a certified check account', and when the check is paid to debit that account with the amount."

The case of *First National Bank of Jersey City v. Leach*, 52 N. Y. Ct. of App., 350, cited by Mr. Maclaren, and to which the learned Chief Justice has referred, contains in the judgment language so apposite to transactions of this nature, that I cite two or three passages therefrom :

" It follows that, after a check is certified, the drawer of the check cannot draw out the funds then in the bank necessary to meet the certified check. The money no longer is his. If he apprehended danger from the suspected failure of the bank, he could not draw out the money, because it had already been appropriated by means of the check then certified ; as to him, it was precisely as if the bank had paid the money upon that check instead of making a certificate of its being good. * * * The bank virtually says 'that check is good ; we have the money of the drawer here ready to pay it. We will pay it now, if you will receive it.' The holder says, 'No, I will not take the money ; you may certify the check and retain the money for me until this check is presented.' The law will not permit a check, when due, to be thus presented and the money to be left with the bank for the accommodation of the holder, without discharging the drawer."

Regarding Lord Blackburn's definition of a cheque as being a bill of exchange drawn upon a banker as being equally negotiable, as if not drawn upon a banker, but upon some one else ; and then if it can be considered that a cheque, certified by the bank upon which it is drawn, possesses the efficacy of enabling the holder to use the cheque with the same facility that he could use the money of the certifying bank, as was stated by the Court in *Merchant's Bank v. State Bank*, 10 Wallace 647, then it is not difficult to reach the conclusion that procuring the bank to certify a cheque is, as far as regards the drawer, payment thereof.

When a cheque is presented at the bank upon which it is drawn, it is presented for payment; but if the holder accepts something else from the bank in substitution for payment, he does so at his peril, for he discharges the drawer.

Judgment.
MACMAHON,
J.

What the effect would be of the drawer of a cheque himself having it certified by the bank upon which it is drawn and then handing to the payee, we are not called upon to consider. The case of *Brown v. Leckie*, 43 Ill. 497, was a case of that kind; and I gather from the report of the case of *Bickford v. First National Bank of Chicago*, 42 Ill. 238 that the drawer procured the cheque to be certified prior to its being delivered to the payee.

I agree with the learned Chief Justice that the motion must be dismissed with costs.

ROSE, J., was not present at the argument, and took no part in the judgment.

Motion dismissed with costs.

[COMMON PLEAS DIVISION.]

PRITCHARD V. PRITCHARD.

Action to recover land—Right to counter-claim without leave—Pleading—Joining in counter-claim other cause of action with claim for land—Right to—O. J. A., Rule 341.

To an action to recover possession of land it is a good cause of counter-claim that defendant was induced by his solicitor's fraud to make two promissory notes, which were then overdue, and in plaintiff's hands, who took them with knowledge of the fraud; and praying that plaintiff might be restrained from negotiating or parting with them, and that they should be delivered up to be cancelled; for the fact of the notes being overdue in plaintiff's hands had not the effect of destroying the right to have them delivered up.

Held, also, that to an action for the recovery of land, the defendant can counter-claim without leave; but that he cannot in his counter-claim without leave under Rule 341 join another cause of action with a claim for the recovery of land.

Judgment.

DEMURRER by the plaintiff to 10th paragraph of defendant's counter-claim.

The action was brought to recover the possession of certain land.

The defendant by the 10th paragraph of his counter-claim, said that he was induced by the fraud of his solicitor to make two notes for \$1,000, which notes were then overdue and in the hands of the plaintiff, who took them with knowledge of the circumstances under which they were given; and asked that the plaintiff might be restrained from negotiating or parting with these notes, and that they might be given up and cancelled.

The defendant by the 11th and 12th paragraphs of his statement of defence and counter-claim, asserted that the plaintiff was then in possession of the lands in question, having been placed in possession by the sheriff under a writ of possession obtained by him in an action against the defendant: the defendant asserted that the plaintiff was not entitled to such possession, because the defendant never was served with any writ of summons in that action; and now claimed damages against the plaintiff because of such possession.

The grounds of the demurrer were that the 10th paragraph of the statement of defence shewed no cause of action or relief against the plaintiff, and that the counter-claim was demurrable, because the defendant by setting up the claim had joined another cause of action with an action for the recovery of land without leave; and that the counter-claim itself in the 11th and 12th paragraphs, must be taken to be a claim to the possession of land, and was joined with the claim in respect of the notes, thus violating the rule against joining another cause of action with a claim to recover land.

On January 11, 1889, the demurrer was argued.

C. J. Holman, for the plaintiff.

Howard, for the defendant.

January 15, 1889. STREET, J.:—

I think the 10th paragraph of the defence and counter-claim shews a good cause of action. The mere fact that the notes are overdue in the hands of the plaintiff, does not seem to have the effect of destroying the right to have them delivered up.

In *Jervis v. White*, 7 Ves. 412, Lord Eldon says, at p. 415: 'The very circumstance, that the holder may compel you to defend yourself against the demand with the expense and vexation attending a suit, is a more reasonable ground for entertaining jurisdiction than for departing from the established doctrine. * * As to depositing the bill of exchange and the letters, it is clear, that under the circumstances admitted in the answer, the defendant ought to be restrained from negotiating this bill; and, if so, the bill ought to be deposited.'

It is true that it does not appear from the report of this case, that the bill of exchange in question was over due at the time of the application; but I cannot see that this should make any difference, the principle being that an

Judgment. instrument which has been fraudulently obtained from the party applying, is in the possession of the other, and may be made use of either by him or by his assignee to the injury or vexation of the party applying, will be ordered to be delivered up to be cancelled, and that the party applying will not be required to wait until an action is brought against him upon it.

STREET, J.

See also *Bromley v. Holland*, 7 Ves. 322; *Simons v. Criddle*, 5 L. T. N. S. 523; *Simpson v. Lord Howden*, 3 M. & C. 104; Joyce on Injunctions, 7th ed., 1872, p. 1317.

The second objection means that a defendant against whom an action is brought to recover the possession, cannot set up any counter-claim unless by leave, without violating Con. Rule 341.

This point has been decided adversely to the contention of the plaintiff here in *Goring v. Cameron*, 10 Pr. 496, in which decision I fully concur.

The last objection is, that a defendant who by counter-claim asks for the possession of land, cannot, except by leave, at the same time join another cause of action in the same counter-claim, without committing a breach of Rule 341.

This was so held in *Compton v. Preston*, 21 Ch. D. 138; but the defendant here does not ask for the possession of the land in question; he asks for damages only, because he has been wrongly turned out.

The demurrer fails upon every ground suggested.

I think the plaintiff, instead of demurring upon the two last grounds to which I have referred, even had they been well taken, should have applied in Chambers to strike out the counter-claim, and that a demurrer was not the proper manner of raising the question.

The demurrer is overruled with costs.

January 16, 1889.—Since the delivery of the foregoing judgment, the counsel for the plaintiff has brought to my attention the fact that the demurrer-book upon which it was based, does not contain a correct copy of the

pleadings; and, upon obtaining from the counsel for the defendant, by whom the demurrer was set down, a true copy of the pleadings, it appears that by the 11th paragraph of the defence and counter-claim, the defendant asserts that the plaintiff has recovered against him judgment in this action for possession of the lands in question, and has been placed in possession by a writ of possession; he submits that the plaintiff, by reason of the fraudulent acts of the plaintiff, set out in his defence, is not entitled to possession; and asks, by way of counter-claim, by the 12th paragraph of his defence, that he may be restored to the peaceable possession of the lands in question.

Judgment.

STREET, J.

I think, in doing this without leave, he has violated Rule 341, because in the same counter-claim he claims possession of the land and asks for relief in respect of the notes, which he says were obtained from him by fraud.

The whole matter appears, however, to arise out of one connected series of transactions which should be tried at the same time; and I therefore give the defendant leave now to include both matters in the same counter-claim.

I give the defendant no costs of the demurrer, because the demurrer-book was seriously incomplete and inaccurate in the manner to which I have referred.

The demurrer is overruled without costs.

Judgment accordingly.

[COMMON PLEAS DIVISION.]

RE PECK AND THE CORPORATION OF THE TOWNSHIP
OF AMELIASBURG.

*Municipal Corporations—Power to take stock in Bridge Co.—Special Act—
R. S. O. ch. 184, sec. 340—Special rate to be levied each year—Form
of.*

Held, that sub-sec. 11 of sec. 479 of the Municipal Act, R. S. O. ch. 184, providing that the council of a municipality may pass by-laws for taking stock, etc., in an incorporated company, in respect of any bridge, etc. "under and subject to the respective statutes in that behalf," only authorizes the passing of by-laws to take such stock where in any special or general Act under which a bridge etc. company is incorporated, a provision is contained authorizing the municipal council to hold such stock, etc.

Where, therefore, the Act incorporating a bridge company, did not profess to confer any power on the municipality to take stock, etc., in such company, no power was conferred under the Municipal Act to do so; and a by-law passed by the municipal council for such purpose was therefore held bad, and directed to be quashed.

The by-law instead of, as required by sec. 340 of the Municipal Act, directing specific sums to be raised each year for the payment of the debt and interest to be so raised in each year by a special rate sufficient therefor, leaving the amount of the rate to be determined in each year, directed that during the currency of the debentures a special rate of so much on the dollar, specifying it, over and above all other rates, should be levied and collected in each year.

Held, this also rendered the by-law bad.

Statement.

THIS was a motion by a ratepayer of the township of Ameliasburgh to quash by-law No. 16, passed on 23rd August, 1888, by the corporation of that township, by which the reeve and treasurer were authorized and required to take and subscribe for 150 shares of \$100 each in the capital stock of the Bay of Quinte Bridge Company for the use of the corporation, and to issue debentures of the corporation to the amount of \$15,000, bearing interest at 5 per cent. per annum, and payable in 20 years, to pay for the stock so subscribed. The by-law, before being passed, had been duly submitted to the votes of the electors and adopted by them.

February, 9, 1889. *Mursh*, supported the motion.
G. H. Watson, contra.

February, 12, 1889. STREET, J. :—

Judgment.

STREET, J.

The first ground taken by the applicant is that the corporation had no power by law to subscribe for, or authorize their officers on their behalf to subscribe for, the stock of the Bay of Quinte Bridge Company.

The power of the corporation to do so is rested by their counsel upon sub-sec. 11 of sec. 479 of the Municipal Act, R. S. O. ch. 184, which provides that "The council of every county, township, city, town, and incorporated village may pass by-laws; * * (11) for taking stock in or lending money, or granting bonuses to any incorporated company, in respect of any road, bridge, or harbour, within or near the municipality, under and subject to the respective statutes in that behalf, or for granting aid by way of bonus to any incorporated road or bridge company."

The words found in this section "under and subject to the respective statutes in that behalf" mean, in my opinion, that wherever in any special or general Act under which a road or bridge company is incorporated, a provision is contained authorizing the municipal council in question to hold stock in it, then in every such case the municipal council may by by-law take stock in the company.

An example of such a provision is to be found in R. S. O. ch. 159, being "The General Road Companies Act," by the 68th section of which it is provided that a municipal council, having jurisdiction within the locality through or along the boundary of which such road passes, may subscribe for stock in the company formed to build it. This I take it is the power under which the municipality can lawfully subscribe for stock in such companies: their own by-law declares their desire to exercise the power; and in the Act which gives them the power are generally contained the terms and conditions subject to which the power may be exercised.

The Bay of Quinte Bridge Company was incorporated in 1887, by a special Act of the Dominion Legislature being

Judgment. ch. 97 of 50-51 Vic. which does not profess to confer upon
STREET, J. any municipality any power to take stock in the company.

I am therefore of opinion that this municipality had no power to subscribe for stock in this particular company, and that their by-law authorizing the subscription must therefore be quashed upon this ground.

The by-law provides that during the twenty years during which the debentures are to run there shall be raised annually \$750 for payment of the interest upon them, and \$750 to form a sinking fund for the payment of the principal, "and that a special rate of one mill and twenty-five one hundredths of a mill on the dollar upon the assessed value of all the rateable property in the township of Ameliasburgh, over and above all other rates and taxes (and which aforesaid rate shall be sufficient to produce in each year the said sum of \$1500), shall be annually levied and collected by the said corporation of the township of Ameliasburgh from the year of our Lord 1888 to the year of our Lord 1908, both years inclusive, unless the said debentures and interest shall be sooner paid."

This provision appears to have been drawn in accordance with sub secs. 3 and 4 of sec. 330 of the Municipal Act, R. S. O. 1877, ch. 174, which provided as follows:

Sub-sec. 3. "The by-law shall settle an equal special rate per annum, in addition to all other rates, to be levied in each year for paying the debt and interest."

Sub-sec. 4. "Such special rate shall be sufficient, according to the amount of ratable property appearing by the last revised assessment roll, to discharge the debt and interest when respectively payable."

These sub-sections were repealed by ch. 31 of 42 Vic. sec. 10 (O), and new provisions substituted which have ever since remained in force, and are now contained in sec. 340 of the Municipal Act, ch. 184, R. S. O. (1887). By the new sub-sec. 3 it is provided that "the by-law shall settle a certain specific sum to be raised annually, for the payment of interest on the debentures; also a certain specific sum to be raised annually for the payment of the debt;" and by the

new sub-sec. 5 it is directed that "the by-law shall provide that such annual sum shall be raised and levied in each year by a special rate, sufficient therefor, on all the ratable property in the municipality." Judgment.
STREET, J.

The change made in the former law by these provisions seems to be this: under the law as it formerly existed the council were first to fix upon the sum which they deemed necessary for paying the interest in each year, and another sum as a sinking fund sufficient to extinguish the principal of the debentures at the expiration of the period for which they were to run. They were then to strike a special rate, which, upon the basis of the last revised assessment roll, would produce in each year the required sum, and the rate so fixed was the invariable rate imposed during the currency of the debentures, irrespective of the fluctuations in the assessment roll during that period.

Under the law as amended the by-law is to provide only that a certain sum shall be raised in each year by a special rate upon all the ratable property in the municipality, thus leaving the amount of the rate to be determined in each year by the amount of the assessment roll in that year.

This by-law is therefore not in accordance with the imperative provisions of sec. 340 of R. S. O. ch. 184. The variation is a substantial one, and the section declares that no by-law shall be valid which is not in accordance with its provisions.

Upon this further ground, therefore, I think that this by-law is bad upon its face, and must be quashed.

Order quashing the by-law with costs.

[QUEEN'S BENCH DIVISION.]

REGINA V. WASON.

Constitutional law—51 Vic. ch. 32 (O.)—*Ultra vires*—B. N. A. Act, sec. 91, para. 27—"Criminal law."

Held, STREET, J., dissenting, that the Act of the Ontario Legislature, 51 Vic. ch. 32, "an Act to provide against frauds in the supplying of milk to cheese or butter manufactories," is *ultra vires*, as coming within the class of "criminal law" reserved exclusively to the Parliament of Canada by the B. N. A. Act, sec. 91, para. 27.

Per ARMOUR, C. J.—The primary object of this Act is to create new offences and punish them by fine, and in default of payment by imprisonment, and this is its true nature and character.

Per STREET, J.—The punishments imposed by the statute are directed to the enforcement of a law of the Provincial Legislature relating to property and civil rights in the Province; the offences created by it formed no part of the criminal law previously existing, and the apparent object is to protect private rights, rather than to punish public wrongs.

Statement.

THE defendant was on the 7th day of July, A.D. 1888, at the town of Peterborough, in the county of Peterborough, convicted before the Police Magistrate for that county for that he, the defendant, at the township of Dummer, in the said county, on the 4th day of June, A.D. 1888, knowingly and wilfully did send and supply to the "Warsaw Cheese Factory," at the village of Warsaw, in the said township, a quantity of milk from which a part of the cream had been removed or taken, without notifying in writing or otherwise the owners or manager of said cheese factory; that a part of the cream had been so removed or taken off the milk so sent and supplied to the said cheese factory; and he adjudged the said defendant for his said offence to forfeit and pay the sum of \$20, to be paid and applied according to law, and also to pay to the complainant the sum of \$18.30 for his costs in that behalf.

This conviction having been brought into this Court by *certiorari*, E. B. Edwards, for the defendant, obtained an order *nisi* to quash the said conviction upon the grounds among others, 1. That the Act of the Province of Ontario

51 Vic. ch. 32, upon which the conviction was based is *Statement. ultra vires* in that the Legislature of Ontario had no power to pass an Act coming within the class of criminal law reserved exclusively to the Parliament of Canada (British North America Act, sec. 91 [27]). 2. Section 7 of said statute of Ontario, professing to deal with the procedure in criminal matters, is *ultra vires* in that such procedure is by the same sub-section of the British North America Act within the exclusive authority of the Parliament of Canada.

On 19th November, 1888, *E. F. B. Johnston*, for the Attorney-General, and *C. J. Holman*, for the Police Magistrate, shewed cause, and *Edwards* supported the order *nisi*. The following cases were referred to: *Regina v. Lawrence*, 43 U. C. R. 164; *Regina v. Roddy*, 41 U. C. R. 291; *Page v. Griffith*, 2 Cart. 308; *Coté v. Chauveau*, 2 Cart. 311; *Pillow v. Montreal*, 1 Mont. L. R. Q. B. 401; *Regina v. Bradshaw*, 38 U. C. R. 564; *Regina v. Bunting*, 7 O. R. 524; *Russell v. The Queen*, 7 App. Cas. 829, at p. 839; *Queddy River Boom Co. v. Davidson*, 10 S. C. R. 222.

February 4, 1889. ARMOUR, C. J.:—

This conviction is grounded upon the Act of the Province of Ontario, 51 Vic. ch. 32, sec. 1, which provides that "No person shall knowingly and wilfully sell, supply, bring, or send to a cheese or butter manufactory, or the owner or manager thereof, to be manufactured, milk diluted with water, or in any way adulterated, or milk from which any cream has been taken, or milk commonly known as 'skimmed milk,' without distinctly notifying, in writing, the owner or manager of such cheese or butter manufactory, that the milk so sold, supplied or brought to be manufactured has been so diluted with water, or adulterated, or had the cream so taken from it, or become milk commonly known as 'skimmed milk,' as the case may be."

Obtaining chattels, money, or valuable securities by

Judgment.

ARMOUR,
C.J.

false pretences, made either by words or acts with intent to defraud, is an indictable misdemeanour, and properly comes within the term "criminal law" as used in the "British North America Act."

The doing what is prohibited by this section was not at the time of the passing of the Act an indictable misdemeanour, nor was it regarded as an offence against the criminal law, except under the Adulteration Act, R. S. C. ch. 107, sec. 15, which provides that "If milk is sold, offered, or exposed for sale, after any valuable constituent of the article has been abstracted therefrom, or if water has been added thereto, or if it is the product of a diseased animal, or of an animal fed upon unwholesome food, it shall be deemed to have been adulterated in a manner injurious to health, and such sale, offer, or exposure for sale shall render the vendor liable to the penalty hereinafter provided in respect to the sale of adulterated food; except that skimmed milk may be sold as such if contained in cans bearing upon their exterior, within twelve inches of the tops of such vessels, the word 'skimmed' in letters of not less than two inches in length, and served in measures also similarly marked; but any person supplying such skimmed milk, unless such quality of milk has been asked for by the purchaser, shall not be entitled to plead the provision of this section as a defence to or in extenuation of any violation of this Act. 2. Nothing in this section shall be interpreted to permit or warrant the admixture of water with milk, or any other process than the removal of cream by skimming."

Sec. 22 imposes a penalty upon "every person who wilfully adulterates any article of food or any drug, or orders any other person so to do;" and sec. 23 imposes a penalty upon "every person who, by himself or his agent, sells, offers for sale, or exposes for sale, any article of food or any drug, which is adulterated within the meaning of this Act": * * * "Provided, that if the person accused proves to the Court before which the case is tried that he did not know of the article being adulterated, and she

that he could not, with reasonable diligence, have obtained that knowledge, he shall be subject only to the liability to forfeiture under the 21st sec. of this Act."

Judgment.

ARMOUR,
C.J.

These provisions of the Adulteration Act would seem to include what is prohibited by sec. 1 of the Act 51 Vic. ch. 32, (O).

The passing of the Adulteration Act by the Dominion Parliament is no reason, however, against the passing by the Ontario Legislature of the section in question, if it comes properly within the powers of that Legislature under the provisions of the "British North America Act."

The validity of the section is defended as a law made in relation to "property and civil rights," and is attacked as a law made in relation to "criminal law."

"The true nature and character of the legislation in the particular instance under discussion must always be determined, in order to ascertain the class of subject to which it really belongs": *Russell v. The Queen*, 7 App. Cas., at page 839; and we have to ascertain, therefore, the primary object of the Act in question.

The primary object of this Act is to create new offences and to punish them by fine, and in default of payment by imprisonment, and this is its true nature and character.

The result sought to be obtained thereby is no doubt fair dealing, and this is the result sought to be obtained by making the obtaining chattels, money, or valuable securities by false pretences with intent to defraud, an offence punishable by imprisonment.

It is sought by this Act to bring about the result that persons contracting to deliver milk to a cheese or butter manufactory will be deterred from dishonesty in carrying out such contracts, and in this way this legislation has relation to property and civil rights, contracts and the enforcement of them, coming clearly within that definition.

But its relation to "property and civil rights" is much more remote than its relation to "criminal law," and it is under the latter class that it must be ranged.

Judgment.
ARMOUR,
C.J.

And coming, as I must hold it to come, within "criminal law," it cannot come within matters of a purely local or private nature.

This legislation being, therefore, outside of the powers of the local Legislature, this conviction must be held invalid, and must be quashed, but it will be without costs and with the usual protection to the magistrate.

STREET, J. :—

The defendant has been convicted of having on 4th June, 1888, at the township of Dummer, in the county of Peterborough, knowingly and wilfully sold and supplied to the "Warsaw Cheese Factory" milk which had the cream partially removed therefrom, contrary to the statute in that behalf.

The statute under which he was convicted is ch. 32 of the Ontario Statutes of 1888, by the first section of which it is provided that no person shall knowingly and wilfully bring or send to a cheese or butter manufactory, or the owner or manager thereof * * milk from which any cream has been taken * * without distinctly notifying in writing the owner or manager of such * * manufactory that the milk sold has had the cream taken from it. By the 4th section of the same statute it is provided that any person who violates the provisions of this section upon conviction thereof before any justice or justices of the peace shall forfeit and pay a sum of not less than \$5, and not more than \$50, together with costs, &c.

The conviction has been removed into this Division *certiorari*, and the defendant moves to quash the conviction on the ground that the provisions of the Act under which he has been convicted are *ultra vires* the Legislature of the Province of Ontario.

By sub-sec. 13 of sec. 92 of the "British North America Act" the Provincial Legislature obtained its power to deal with matters relating to "property and civil rights," and by sub-sec. 15 to pass laws providing for the imposition

punishment by fine, penalty, or imprisonment for enforcing any law of the Province made in relation to any matter coming within its legislative powers. Judgment.
STREET, J.

The adjustment of the basis upon which the dealings between the managers of cheese factories in the Province and the persons supplying milk to them should take place, and the devising of the best means of securing the former against unfair dealing on the part of the latter, seem to fall well within the scope of the description of "property and civil rights in the Province;" and if the punishment imposed had been confined to pecuniary damages for the loss sustained there could be little doubt as to the validity of the Act. We have, however, here not only a law forbidding the delivery of skimmed milk to the manufacturer, but the imposition on the person delivering it of a punishment upon his conviction, before a justice of the peace, of a violation of the provisions of the Act, and it is urged that this is a transgression upon the power exclusively reserved to the Dominion Parliament of dealing with the criminal law of the Dominion.

There are good reasons for holding that the Provincial Legislatures could not, by the mere act of passing a statute forbidding the doing of some thing, already an offence, but affecting property and civil rights in the Province, confer upon themselves jurisdiction to inflict a new punishment for the offence, and justify it upon the ground that they were merely enforcing their own statute. The foundation for the jurisdiction claimed would be defective because of its dealing with matters of criminal law. But when the "British North America Act" was passed it was not an offence either at common law or by statute for a person to deliver skimmed milk without revealing the fact. See *Burnby v. Bollett*, 16 M. & W. 644, in which the old statutes upon kindred matters are quoted. I do not mean to say that this is the only test to be applied, but it clears the ground of the initial difficulty and leaves it open to us to consider the real character of the legislation which is attacked, that legislation being within the letter

Judgment.

STREET, J.

of the powers of the Legislature under the Constitutional Act. Is it an Act constituting a new crime for the purpose of punishing that crime in the interest of public morality? Or is it an Act for the regulation of the dealings and rights of cheese makers and their patrons, with punishments imposed for the protection of the former? If it is found to come under the former head, I think it is bad as dealing with criminal law; if under the latter, I think it is good as an exercise of the rights conferred on the Province by the 92nd sec. of the "British North America Act." An examination of the Act satisfies me that the latter is its true object, intention, and character. It is not made an offence to deliver skimmed, sour, tainted, or adulterated milk to the cheese maker, and we should expect to find in an Act intended for the public interest; the offence consists in doing so without notifying the fact to the cheese maker; he is the person injured by the breach, and intended to be protected by the notice. It is true that the cheese maker is not necessarily required to be the informant upon a prosecution under the Act, but he is the only person who is authorized to compel the person who has delivered the milk, to submit his cows and his milk to the tests provided by the Act. These tests appear to be the only practicable means in most cases of obtaining proof of the offence. They are, at all events, the means pointed out by the statute, and if the offence created were intended to be punished in the interests of the public and not of the cheese maker, we should have expected to find the means of proving it placed in the hands of the officers of public justice, and not confined to the person against whom the offence is alleged to have been committed.

Finding then, as I do in this statute, that the punishments imposed by it are directed to the enforcement of the law of the Provincial Legislature relating to property and civil rights in the Province; that the offences created by it formed no part of the criminal law previously existing; and that the apparent object of the Act is to protect private

rights rather than to punish public wrongs, I am obliged to differ from the conclusion at which the Chief Justice has arrived, and to say that in my judgment the conviction should be affirmed, and the motion dismissed with costs.

Judgment.
STREET, J.

FALCONBRIDGE, J., agreed with ARMOUR, C. J.

Conviction quashed.

[QUEEN'S BENCH DIVISION.]

CURRY V. CANADIAN PACIFIC RAILWAY COMPANY.

Railway company—Negligence—Invitation to passenger to board moving train—Patent danger—Question for jury—New trial.

The plaintiff, who was a passenger on a train of the defendants, alighted at a station, and the train having started before he had re-entered it, endeavored to jump on while it was in motion. In doing so he was injured, and brought this action for damages for negligence. There was evidence of an invitation by the conductor of the train to jump on while it was in motion, and the jury found (1) that there was such invitation. They also found (2) that the plaintiff used a reasonable degree of care in endeavoring to get on; and (3) that he was injured while trying to get on, in pursuance of the request of the conductor. It was argued by the defendants that the danger to the plaintiff was so patent and obvious that he had no right to act on the conductor's invitation, or to attempt to get on the train.

Held, that this was a matter which should have been submitted to the jury, and that it was not covered by the second finding; that the questions involved in the action could not be determined upon the findings, and that there should be a new trial.

Per ARMOUR, C. J.—Questions for the jury suggested.

THIS action was tried before STREET, J., and a jury, at the Toronto Spring Assizes, 1888.

The statement of claim alleged that the plaintiff, who was a cattle drover, was on the 23rd May a passenger on a train of defendants in charge with two assistants of a consignment of cattle from Milton to Montreal, and had in consideration of the premises received from defendants a ticket or pass entitling him to be safely carried on said train in charge of said cattle to Montreal.

Statement.

That on the morning following the 23rd of May, the plaintiff was informed by the defendants' servants that the said train would stop at Sharbot Lake, (a station on defendants' line,) a sufficient length of time to enable plaintiff and his assistants to get breakfast.

That on arriving at Sharbot Lake aforesaid, the said train did stop, and upon defendants' servants repeating the representations referred to, the plaintiff and his servants alighted from said train and were shewn by defendants' servants to a hotel close by for the purpose of getting breakfast.

That whilst the plaintiff was engaged in getting his breakfast, the defendants, without waiting nearly the length of time represented, negligently and without any warning to the plaintiff, started the said train, and the plaintiff on becoming aware of the fact, as it was absolutely necessary for him to go on the same, rushed out and, at the express invitation of the defendants to board the said train, and using all possible and reasonable care in that behalf, yet whilst attempting to do so, owing to the facts aforesaid, and the negligence of the defendants, the plaintiff was thrown violently to the ground and received injuries, &c.

The defendants by their statement of defence denied all charges of negligence, and said that the accident which happened to the plaintiff resulted purely from his own negligence and failure to use ordinary care on the occasion referred to.

Questions were submitted to the jury, which were answered as follows :

1. Did the conductor tell the plaintiff to get on the train whilst it was in motion ? Ans. Yes.

2. If the conductor told the plaintiff to get on the train whilst it was in motion, did the plaintiff use a reasonable degree of care in endeavouring to do so ? Ans. Yes.

3. Was the plaintiff injured while trying to get on the train in pursuance of the request of the conductor ? Ans. Yes.

4. If the plaintiff is entitled to damages, at what sum do you fix them? Ans. \$2,000. Statement.

Upon these findings the learned Judge directed judgment to be entered for the plaintiff for \$2,000.

At the Easter Sittings (1888) of the Divisional Court *G.T. Blackstock* obtained an order *nisi* to set aside the verdict and judgment for the plaintiff, and to enter a verdict and judgment for the defendants, or for a new trial on the following grounds:

1. The answers to the questions and the verdict generally are contrary to law and evidence and the weight of evidence.

2. The evidence disclosed no cause of action against the defendants, and upon the admitted facts the learned Judge ought to have dismissed the action.

3. There was no breach of duty proven on the part of the defendants' servants, and the plaintiff himself was the cause of the accident which befell him. The conductor of the train had no authority to extend an invitation to the plaintiff to get on the train when in motion, and if the plaintiff did so attempt to get on, the defendants are not liable, and the jury should have been so instructed.

4. Even if the conductor had been authorized to invite the plaintiff to get on the train while in motion, it was the duty of the plaintiff to avail himself of that invitation with strict particularity, which he did not do.

5. Upon the whole case a verdict should have been entered for the defendants.

On the 3rd September, 1888, *Blackstock* supported the order *nisi*. Was the invitation to get on the train when in motion such an invitation as the conductor should have given and the plaintiff should have accepted? If the danger was so patent that anybody might see it, the plaintiff should not have exposed himself: *Lax v. Darlington*, 5 Ex. D. per Bramwell, L. J., at p. 34; *Clayards v. Dethick*, 12 Q. B. 439. If, as a matter of law, responsibility devolves upon a railway company by reason of the invitation of a conductor, the passenger must comply strictly with the invitation.

Argument.

According to the plaintiff's evidence here, the invitation was to "hand up the lunches and jump on." By this the conductor must have meant handing up the lunches as a condition of getting on. The defendants do not admit that any invitation was given at all, or if it was that the companies were made responsible thereby, but probably the jury finding will not be disturbed, and the defendants say that the invitation was not strictly complied with. On the question of invitation, I refer to *Pierce on Railroads*, 329.

J. W. Elliott, for the plaintiff, shewed cause, and referred to *Smith on Negligence*, 2nd Eng. ed., pp. 235, 236, and App. B.; *Pollock on Torts*, Eng. ed. of 1887, pp. 359, 373, 374, 377; *Wood on Railroads*, ed. of 1885, pp. 1155, 1156; *Wharton on Negligence*, ed. of 1878, secs. 369, 370; *Bridges v. North London R. W. Co.*, L. R. 7 H. L. 213, pp. 233 *et seq.*; *Wanless v. North Eastern R. W. Co.*, L. R. 7 H. L. 12; *Haklan v. Great Western R. W. Co.*, C. P. 89; *Edgar v. Northern R. W. Co.*, 4 O. R. 201; *Dunlop v. Grand Trunk R. W. Co.*, 58 Maine 187.

Blackstock, in reply, referred to *Cameron v. Milloy*, C. P. 340; *Pittsburgh etc. Railway Co. v. Krouse*, Ohio, at p. 239.

February 4, 1889. FALCONBRIDGE, J. :—

There was evidence to support the findings of the jury in answer to the 1st and 3rd questions, and the only grounds on which we can be asked to disturb the verdict are those set forth in the 2nd, 3rd, and 4th paragraphs of the order nisi, i. e. whether the invitation which the jury have found that the conductor gave, was such an invitation as he had a right to extend, and the plaintiff had a right to avail himself of. The following is the plaintiff's account :

Q. Well, what happened then? A. We just looked around and the train going out. Q. Was it far from this hotel to the track? A. It was not very far; it might be 25 or 30 yards. Q. When you noticed

train going past, what did you do? A. I grabbed the lunches in my hand and ran out. Q. What did Lanisborough do? A. He ran out ahead of me. He kept ahead of me. Q. What did he do? A. He grasped a car on the train, and jumped on. I then grabbed a car, and the conductor ran along the top of the train, and lay down on his belly, about where I was, and says he, 'hand those parcels to me and jump on'; the train was moving, and I was opposite the track, just alongside the train; he ran back to where I was and lay on a freight car on his belly and told me to hand up those parcels and jump on, that he was going. Q. What did you do? A. I just grabbed the hand rail of a car with my right hand and handed up with my left hand the parcels. Q. What happened then? A. I got a jerk which dragged me under the wheel and it ran over my foot then. Q. As I understand, you went up and had stopped, and the conductor told you to hand up your parcels to him, and whilst you were doing that you received a jerk, and met with the injury; by a jerk of the train your foot was brought under the wheel and crushed? A. Yes, sir, and the foot was cut off.

Judgment.
Falconbridge,
J.

Q. Why did you go up to the car at all, Mr. Curry? A. Well, I would not have gone up at all if this man had left me alone; he was laying on top hollering to me, telling me to reach the parcels up to him, and jump on.

On cross-examination he says:

Q. When you got the lunches, you came out of the hotel? A. The whole of the lunches were not ready; I just grabbed what they had ready, and went out. Q. I did not ask you that; I really must ask you to answer my question; when you got the lunches you ran out of the hotel? A. Yes sir. Q. And the train was then in motion? A. Yes, sir. Q. Going at what rate? A. I cannot say how fast. Q. How much? A. She was going a pretty smart run; I could keep up with her. Q. How fast, the trot of a horse? A. Oh no, a slow trot. Q. What would you say, 5 or 6 miles an hour? A. Yes, it might be going that. Q. The train was immediately in front of you when you came out of the hotel? A. Yes, sir.

Q. The trouble with you was you had these two lunches in your hand. that was your difficulty? A. Yes sir. Q. Which hand did you have them in? A. Left hand. Q. And you ran northwards from the hotel? A. Yes, kind of like that.

Q. That is to say, the track was north of the hotel? A. Yes, sir. Q. And the train was going eastward? A. Yes, sir. Q. Well then, it is this way, if the train were going eastward, and you grabbed on to it with your right hand, it would drag you into the train, wouldn't it? A. When I got hold of it that way, reaching up, I got a jerk, and was drawn in. Q. If you grabbed at the train with your right hand, the result would be to bring you forward, wouldn't it? A. Well; I suppose it would. Q. And that is what happened to you, you were swung inwards

Judgment. towards the train and got in between the cars? A. Yes, sir. Q. And that is the way you got your injury? A. Yes, sir.
Falconbridge, J.

Q. And when he got opposite a car, he jumped? A. Yes. Q. And when you got to one, you jumped? A. No, I stopped running before got up to the car. Q. And what did you stop running for? A. Because I thought I would not jump on; because I had these parcels in my hand. Q. Then, you subsequently altered your mind? A. As soon as the conductor lay down on the top of the train.

Q. Now, did you make more than one jump to get on the train? A. No, sir. Q. Then, what you jumped at on the occasion when you did make the jump, were the iron steps that led up the side of the box freight car? A. Yes, sir. Q. And you attempted to jump with the lunches in your hand? A. No, sir; I intended him to take them. Q. But he did not? A. No. Q. This car passed you and he did not get the lunches? A. No, sir; I got thrown in when he was trying to take the lunches out of my hand. Q. What were you doing at that time? A. I was reaching up to him when I got thrown. Q. And you had hold of the car? A. Yes, sir. Q. With your right hand? A. Yes, sir. Q. Which end of the car—the forward or back end? A. The back end. Q. You were running, holding on to the car with your right hand, and the car going eastward, and you were holding the lunches with your left hand? A. Yes, sir. Q. You are quite certain you never made but one jump to get on the train? A. Yes, sir; that is all I made.

I give the plaintiff's account because the principal conflict of evidence is not on this branch, but as to the invitation, (which has been settled by the finding of the jury) because the jury must have preferred his account to that of any one differing from him, and because the defendant's counsel maintains that on his own shewing the plaintiff is not entitled to recover.

We were not referred to any case which supports the contention that a conductor has no right or authority to give an invitation such as was given and acted on here. One would, perhaps, be somewhat surprised to find such a case in view of the extended power over his train, and over the passengers thereon, vested in a conductor in Canada and the United States of America.

The real point in this case arises on the defendant's argument that the danger to the plaintiff was so patent and obvious that he had no right to act on the conductor's invitation or to attempt to get on the train. The plaintiff

own testimony is relied on by the defendants as shewing Judgment.
that he knew the attempt was dangerous.

Falconbridge,
J.

In the English and Canadian cases which I have looked at, the invitation of the defendants or their agent is not so direct and pointed as it is here. It is rather implied from the circumstances or from a general invitation, such as calling out the name of a station; *Lax v. Darlington*, 5 Ex. D. at p. 34; *Wyatt v. Great Western R. W. Co.*, 6 B. & S. 709; *Haldan v. Great Western R. W. Co.*, 30 C. P. 89; *Siner v. Great Western R. W. Co.*, L. R. 3 Ex. 150; L. R. 4 Ex. 117; *Cameron v. Milloy*, 14 C. P. 340; *Bridges v. North London R. W. Co.*, L. R. 7 H. L. 213; *Wanless v. North Eastern R. W. Co.*, L. R. 7 H. L. 12; *Edgar v. Northern R. W. Co.*, 4 O. R. 201.

The result of the American cases is given in Mr. Wood's treatise on the Law of Railroads, sec. 307: "But while as previously stated, generally an attempt to get aboard a train in motion, will be treated as evidence of negligence *per se* on the part of the passenger, yet instances may exist where it is not so, and the passenger is justified in making the attempt; but in such cases liability arises, if at all, because of the fact that the danger was not obvious; or because the agents of the company directed the passenger to make the attempt. But even where the agents of the company direct the passenger to do so, the company is not liable, if it was gross negligence on the part of the passenger to make the attempt in view of all the circumstances; and whether it was so or not depends upon the fact whether, under the circumstances, the act was obviously dangerous, and is a question for the jury."

I think it was a question for the jury in this case, and I do not see how the learned Judge could have withdrawn it from them.

But has this question been directly passed on by the jury? viz., was the danger so obvious that a reasonable man would not have accepted the conductor's invitation? or, in other words, was it or was it not gross negligence on the part of the plaintiff to make the attempt, in view of all the circumstances?

Judgment
Falconbridge,
J.

I at first thought that this question was involved in and covered by the second one, * * Did the plaintiff use a reasonable degree of care in endeavouring to do so?

But on more mature consideration, I think it is not. The question which I suggest touches the reasonableness of plaintiff's attempting to board the train at all—a very different thing from the degree of care exercised by him in endeavouring to do so after he has made up his mind to attempt it.

The learned Judge in his charge seemed to point rather to the degree of care used in actually trying to get on. He says :

“The second question for you will be—

“If the conductor told the plaintiff to get on the train whilst it was in motion, did the plaintiff use a reasonable degree of care in endeavouring to do so?

“If the plaintiff did not use a reasonable degree of care in getting on the train, then the defendants would not be liable. You will consider it in this view—the plaintiff must have known it was a very dangerous thing to do. Well, that being so, did the conductor tell him to get on and was he justified in trying to get on? But, if he tried to get on knowing it was a dangerous thing to do, even if you should consider he was justified, in view of the invitation of the conductor, in trying to get on, he must exercise a very great amount of care in trying to get on, and if he did not exercise a very great amount of care, still the defendant would not be liable.”

At least the question is ambiguous, and the answer which has been given is not inconsistent with a finding that he ought not to have endeavoured to get on, and is not, therefore, decisive of the case. I do not think we can decide the point, which has been left untouched upon the evidence before us; and there must be a new trial with the costs of the former trial and of this motion to be costs in the cause.

ARMOUR, C. J. :—

I do not think that we can satisfactorily determine the questions involved in this suit upon the questions propounded to the jury, and upon the answers thereto given.

by them, and that there must, therefore, be a new trial.

Judgment.

ARMOUR,
C.J.

In determining whether or not the defendants were guilty of negligence causing the injury to the plaintiff, and whether or not the plaintiff was guilty of contributory negligence, the jury should be asked to consider whether or not the alternative imposed upon the plaintiff of boarding the train or losing his passage by it, was so imposed by the misconduct of the defendants or by his own misconduct, and in arriving at a conclusion as to this, to consider whether the conductor did or did not inform the plaintiff that he would stop 10 or 15 minutes or more at Sharbot Lake; if he did, did he stop that length of time, or did he start before that time was up? Did he send a brakesman to warn the plaintiff that he was about to start? Did the brakesman warn the plaintiff to that effect? Did a reasonable time elapse after such warning, if given, to enable the plaintiff to board the train before he started it? If such warning was not given, ought the conductor, reasonably acting, to have waited until the return of the brakesman before he started the train? Did he so wait?

The jury should also be asked to consider whether the plaintiff had made up his mind to board the train, and attempted to do so irrespective of any invitation on the conductor's part, or had he made up his mind not to board the train, or to desist from attempting it until he was invited to do so by the conductor, and changed his mind under the influence of such invitation.

They should also consider the speed at which the train was going at the time the plaintiff attempted to board it and the risk attending the boarding of such a train under such circumstances.

The question of negligence and of contributory negligence is essentially and entirely, where there is any evidence to be left to them of it, a question for the jury; and I content myself, therefore, with the suggestion of matters which I think ought to be considered by them in

Judgment. arriving at a conclusion, without in any way intending to
ARMOUR, limit them to the consideration of these matters only, or to
C.J. exclude any other matters properly coming before them
upon the trial from their consideration.

STREET, J., was not present at the argument, and took no part in the judgment.

New trial ordered.

[On the second trial the jury found in favour of the defendants.]

[QUEEN'S BENCH DIVISION.]

RE CRAWFORD V. SENEY.

Prohibition—Division Court—Title to land.

The plaintiff agreed to sell to the defendant a parcel of land for \$1,750, of which \$10 was paid on the execution of the written agreement. The agreement contained no provision as to possession, but the defendant went into possession as the purchaser. The plaintiff was unable to make title and the defendant continued in possession for a considerable time.

The plaintiff brought a Division Court action for use and occupation. The defendant set up that the contract had not been rescinded when he gave up possession and that he never became tenant to the plaintiff nor liable to pay rent.

Held, that the plaintiff was bound to prove a contract, express or implied, to pay compensation for the use and occupation, and in order to do so, it might have been necessary to show when the contract of sale went off; but that was not a bringing of the title into question so as to oust the jurisdiction of the Division Court.

2. That in prohibition the Court must be satisfied that the title really comes in question; it is not enough that some question is raised by the defendant's notice.

Purser v. Bradburne, 7 P. R. 18, distinguished.

Order of STREET, J., granting prohibition reversed.

MOTION by the defendant for a prohibition to the Judge clerk, and bailiff of the 4th Division Court of the county of Victoria, argued before Street, J., in Chambers on the 1st February, 1889.

McSweyn, for the motion.

Masten, contra.

February 4, 1889. STREET, J.:—

Judgment.

STREET, J.

The action in the Division Court is brought to recover for the use and occupation by the defendant of a parcel of land which the plaintiff had agreed to sell to the defendant, and possession of which had been delivered by the plaintiff to the defendant under the contract of sale. The defendant objected to the plaintiff's title, and negotiations continued for some time, during which the defendant remained in possession. The plaintiff contended that the contract had been in effect rescinded some months before the defendant gave up possession, and claimed that during that time he had become her tenant. The defendant contended that the contract had not been rescinded until he gave up possession, and that he never became tenant to the plaintiff, nor liable to pay rent to her.

The learned Judge of the Court below has held that he had jurisdiction to entertain the question, considering that no issue was raised as to the title of land.

The whole question to be determined here appears to be one which upon the authorities has been decided to involve the title to land. The plaintiff alleges and the defendant denies that the defendant became tenant to the plaintiff. The solution of this issue involves, necessarily upon the facts, the determination of the question whether during the period for which rent is claimed the defendant was equitable owner of the property or not, because if in possession in that capacity he is clearly not liable to pay rent: *Winterbottom v. Ingham*, 7 Q. B. 611; *Howard v. Shaw*, 8 M. & W. 118.

The existence of a *bond fide* dispute as to whether or not a tenancy had been created has been repeatedly held to involve the question of the title to land: *Purser v. Brudburne*, 7 P. R. 18; *Coulson v. O'Connell*, 29 C. P. 341; *Worman v. Brady*, 12 P. R. 618.

The case is easily distinguishable from that of *Re Bushell v. Moss*, 11 P. R. 252, cited to me by the plaintiff, by the circumstance that here no finding of fact could give the Division Court jurisdiction: the whole question in dispute, viz., tenancy or no tenancy, being one involving the title to land under the authority of the cases to which I have referred.

I think for these reasons that the order for prohibition should go.

The plaintiff appealed from this decision, and his appeal

Judgment. was heard by a Divisional Court composed of ARMOUR, Falconbridge, C. J., and FALCONBRIDGE, J., on the 13th February, 1889.
J.

Watson, for the appeal.

McSweyn, contra.

March 7, 1889. FALCONBRIDGE, J.:—

The facts are set forth in the judgment appealed from.

It matters not, I take it, what the defendant chose to set up in his notice disputing the plaintiff's claim. Following is the statement of the learned County Judge as to the matter in dispute at the trial: "There is no dispute as to the title. Both parties agree that the plaintiff was in possession; that she agreed to sell to the defendant; that he went into possession under that agreement; that she could not make a title which defendant was willing to accept; and the only dispute between them is as to whether there were further attempts to make it afterwards."

Upon this statement it seems clear that the title was not brought into question at the trial.

In Courts of inferior jurisdiction it depends not upon the defendant's pleadings or notices but upon what takes place at the trial, whether the title to land comes in question or not. It would be a monstrous thing if the defendant in a Division Court action could, by setting up a question of title in his notice disputing claim, *ipso facto* oust the jurisdiction of that Court. In this case the learned Judge has decided, and I think rightly, that there was no *bond fide* raising of a question of title by the defendant.

Purser v. Bradburne, 7 P. R. 18, and other decisions in the same direction, prevent a defendant who has distinctly raised a question of title on the pleadings from afterwards being heard to say, on the question of costs, that the action was not properly brought in the High Court. I do not understand them to decide that a defendant can, by merely

pleading *non demisit*, oust the jurisdiction of the inferior Court.

Judgment.
ARMOUR,
C.J.

The appeal will be allowed with costs.

ARMOUR, C. J. :—

This was not, in my opinion, an action in which the right or title to any corporeal or incorporeal hereditament came in question.

The plaintiff agreed to sell to the defendant a parcel of land for \$1,750, of which \$10 was paid on the execution of the agreement, which was in writing.

The agreement contained no provision as to possession: the defendant, however, went into possession as the purchaser.

The plaintiff was unable to make title to the parcel of land agreed to be sold to the defendant, and the defendant continued in possession for a considerable length of time, and this action was brought for use and occupation.

The defendant having gone in under the plaintiff, it was not competent for him to deny the plaintiff's title in the action for use and occupation.

In that action the plaintiff was bound to prove a contract express or implied, to pay compensation for the use and occupation, and in order to do that it may have been necessary for the plaintiff to prove when the contract of sale went off. I do not think that was a bringing of the title into question so as to oust the jurisdiction of the Division Court.

In my opinion, the appeal should be allowed with costs, and the motion for prohibition dismissed with costs.

The decisions as to questions of costs are not safe guides in determining a question of this kind, because a defendant may bring the title to land into question by his pleadings and so subject himself to High Court costs, but in prohibition we have to be satisfied that the title really comes in question before we can prohibit.

*Appeal allowed with costs and motion
dismissed with costs.*

[QUEEN'S BENCH DIVISION.]

RE ELLIOTT & SON v. NORRIS.

Prohibition—Division Court—Territorial jurisdiction—Transcript to another Division Court after judgment.

A plaint was brought in the first Division Court of Middlesex upon a contract signed by the defendant, dated at London, to pay to the order of the plaintiffs at London, "\$16 in wood delivered on the Hamilton and North Western Railway," which was not in Middlesex. The defendant resided in the county of Simcoe.

Held, that the Court in which the plaint was brought had no jurisdiction. The defendant filed a notice disputing the claim and the jurisdiction, but did not appear at the trial, and judgment was given against him. Subsequently a transcript of the judgment was transmitted to the seventh Division Court of Simcoe.

Held, that the judgment did not thereby become a judgment of the Simcoe Court, and prohibition to the Middlesex Court was granted after such transmission.

:Statement.

MOTION by the defendant for prohibition to the first Division Court of the county of Middlesex. The plaint in the Division Court was upon the following agreement signed by the defendant :

London, Ont., July 3rd, 1886.

On or before the 1st day of April, 1887, I promise to pay to the order of John Elliott & Son, at their office in London, \$16, in wood, delivered on the Hamilton and North Western Railway, for value received, and if not prepared to pay when due and longer time is granted, to be at ten per cent. until paid. I reside in the township of Nottawasaga, and own 100 acres of lot 5, con. 2, in my own right.

The defendant on being served with a summons filed a notice disputing the claim of the plaintiff on the ground that the contract sued on was fulfilled, and also disputing the jurisdiction of the Court, for that the whole cause of action arose within the limits of the seventh Division Court of the county of Simcoe. The defendant did not appear at the trial, and judgment was given against him ; and subsequently a transcript of the judgment was transmitted to the clerk of the seventh Division Court of the county of Simcoe.

The motion for prohibition was argued in Chambers on the 29th March, 1889.

T. W. Howard, for the motion.

J. B. Clarke, contra.

Judgment.

GALT, C.J.

April 1, 1889. GALT, C. J. :—

It is manifest from the agreement itself that the defendant did not reside within the limits of the first Division Court of Middlesex, and, moreover, that the contract on the part of the defendant was to be performed on the line of the Hamilton and North Western Railway, which is not within those limits. The contract was dated "London," but it was not executed there ; it is, therefore, manifest that the Court had no jurisdiction, and, therefore, this prohibition must be granted, but, as the litigation has arisen from the neglect of the defendants in not being represented at the trial, there will be no costs.

Mr. Clarke contended that as a transcript of the judgment had been sent to the seventh Division Court of Simcoe, the case had been transferred to that Court, and the application should have been to stay proceedings in that Court. This does not appear to me to be correct. Sec. 217 of the Division Courts Act, R.S.O. ch. 51, provides for the transmission of the transcript, and then provides : "and all proceedings may be taken for the enforcing and collecting the judgment in such last mentioned Division Court, by the officers thereof, that could be had or taken for the like purpose upon judgments recovered in any Division Court." It makes no provision for transferring the cause to the other Court, whereas by the 224th section, where a transcript has been transmitted to a County Court, it is enacted, "the same shall become a judgment of the County Court."

Order made for prohibition. No costs.

[CHANCERY DIVISION.]

DALZIEL V. MALLORY.

Assessment and taxes—Tax sale—Neglect of duties by clerk and assessor under R. S. O. (1877), ch. 180, sec. 109—Curative effect of R. S. O. (1877), ch. 180, secs. 155, 156.

In 1882 a lot of land in the village of F., assessed for 1879 as "non-reassessed," was sold for the taxes of the latter year, the treasurer's deed therefor being executed in 1883.

In an action of ejectment brought by the purchaser against the original owner in 1888, it appeared that in 1882 the list of lands liable to be sold for arrears of taxes required by sec. 108, R. S. O. (1877), ch. 180, and which contained the lot in question, was sent by the treasurer to the clerk of the village, but that it had been lost, and although the land was occupied at the time, it was not returned "as occupied" nor was the owner notified that it was liable to be sold for taxes as provided for by sec. 109, R. S. O. (1877), ch. 180.

Held, [BOYD, C. dissenting] that the sale was invalid, and that notwithstanding the lapse of time these defects were not cured by secs. 155 or 156, R. S. O. (1877), ch. 180.

Per PROUDFOOT, J. The want of notice to the defendant of the arrears and of the liability of his land to be sold for them was the want of an essential requisite to the power of sale.

Per FERGUSON, J. The land having become occupied and having sufficient distress on it to satisfy the taxes, should, notwithstanding the errors of the municipal officers, be considered as if it had been returned "occupied" and the sale under such circumstances being forbidden by sec. 130, R. S. O. (1877), ch. 180, was not cured by sec. 156 of the statute.

Per BOYD, C. The omission to raise within the proper time the objection that sec. 109, R. S. O. (1877), ch. 180 was not complied with is cured by sec. 156: that section being in the nature of a statute of limitations to such objection.

Decision of MACMAHON, J., affirmed.

Statement. THIS was an appeal from the judgment of MACMAHON,

The action was tried at Sarnia, on March 28th, 1888, without a jury.

J. F. Lister, for the plaintiff.

Meredith, Q.C., and *Gorman*, for the defendant.

The facts sufficiently appear in the judgments.

MACMAHON, J.—This is an action of ejectment, tried before me at Sarnia, to recover possession of lot No. 93, on the east side of Arthur street, in the Village of Forest, in the county of Lambton.

The plaintiff's title rests on a purchase by him of the lot in question at a tax sale held on the 3rd November, 1882; and for which a deed was executed to him by the warden and the treasurer on the 11th November, 1883.

Judgment.
MACMAHON,
J.

The lot in question was sold for taxes due thereon for the year 1879, the taxes being 76 cents, the interest and costs of advertising, &c., \$1.75, making in all \$2.51.

One George M. VanValkenburg was the owner of the lot up to May the 27th, 1879, when he conveyed to the defendant, the consideration expressed in the deed being \$110.

The defendant who lived on the borders of the corporation of Forest, and was well known in the village, after purchasing the lot, repaired the fences and sowed Hungarian grass seed in 1879, and took off the crop that autumn.

The clerk of the municipality produced the assessment roll for the year 1879, by which it appears this lot was assessed that year as non-resident, although VanValkenburg, being the defendant's grantor, is described in the deed as of the village of Forest, watchmaker.

The defendant in his evidence states that in the year 1880, he gave in the lot to the collector himself and paid the taxes for that year, and the collector's receipt is produced, showing that the taxes were paid by him on the 2nd December, 1880, but from the receipt, the lot appears to have been entered as non-resident. In the receipt for 1880, there is a schedule of the various rates struck against the lot, and the amount for each rate so struck is carried into a money column, and forming part of the schedule is one item "arrears of taxes on unoccupied land," but no amount is carried into the money column opposite this item, nor is there anything to indicate that there are arrears of taxes due on the lot for the year 1879.

The lot was in occupation of Simeon Mallory, a son of the defendant's, during the years from 1880 to 1885, both inclusive, and the lot was cropped by him during these years with potatoes, or potatoes and carrots; and with the exception of the years 1880 and 1881 (for both of which years the defendant himself paid the taxes), the son paid the taxes: and receipts from the collector for the years 1884 and 1885, are produced. The receipts for the taxes paid by the defendant for the years 1886 and 1887, are also produced.

Under ch. 193, sec. 140, R. S. O., the treasurer of every county is required to furnish to the clerk of each municipality a list of all the lands in his municipality in

Judgment.
MACMAHON,
J.

respect of which any taxes have been in arrear for three years next preceding the 1st day of January in every year, and such list shall be so furnished on or before February 1st in every year. The 141st sec. of the Act enacts as follows: "The clerk of the municipality is hereby required to keep the said list, so furnished by the treasurer, on file in his office * * and he shall also deliver to the assessor or assessors of the municipality, in each year, as soon as such assessor or assessors are appointed, a copy of such list; and it shall be the duty of the assessor or assessors to ascertain if any of the lots or parcels of land contained in such list are occupied, or are incorrectly described, to notify such occupants, and also the owners thereof, if known, whether resident within the municipality or not, upon their respective assessment notices, that the land is liable to be sold for arrears of taxes, and enter in a column (to be reserved for the purpose) the words "occupied and parties notified," or "not occupied," as the case may be; and all such lists shall be signed by the assessor or assessors and returned to the clerk with the assessment roll, together with a memorandum of any error discovered therein."

The deputy treasurer produced a list of lands in the village of Forest liable to be sold for taxes in the year 1882, a copy of which was sent to the clerk of Forest on the 27th January, 1882, and that list contained the lot in question. (It was admitted that the list sent by the county treasurer to the clerk at Forest was lost.)

The assessor says that during the time he was assessor, from 1880 to 1887, he thinks the lot was assessed to the defendant or his son Simeon. He says it is likely he would receive the list sent by the treasurer to the village clerk as to lands liable to be sold for arrears of taxes, and if he received the list he would make the necessary enquiries to see if this lot was occupied or unoccupied, and if the lot had been cropped he would not have returned it as unoccupied, if he had known who the owner was.

In 1880 the land is assessed as non-resident, although the defendant says he gave his name to the assessor that year, as being the owner. He certainly paid the taxes and got the receipt for the same from the collector that year, and said he was assessed and paid the taxes in 1881.

The assessor says that at the time the lot was assessed he may not have seen it all; that he may have known the lot without going to see it. It may possibly be, and it is likely the fact, that in consequence of the assessors know-

ing the lot that it was not visited, and therefore the copy of the list sent by the treasurer to the village clerk may not have undergone revision as required by sec. 141 of ch. 193 R. S. O., above referred to, and that the notice that the lot was liable to be sold for arrears of taxes for the year 1879 was in consequence of this non-revision of the list not sent to the defendant.

The defendant says he never received any notice that this lot was liable to be sold for taxes either on his assessment notice or at any other time; and I regard this as being the fact.

The objection that no notice was sent the owner, that the land was liable to be sold for taxes was taken in *Haisley v. Somers*, 13 O. R. 600, and was allowed to prevail: Proudfoot, J., holding that the neglect to give such notice to the owner, was not cured by R. S. O. (1877), ch. 180, sec. 155, and he refers to *Allan v. Fisher*, 13 C. P. 63, in support of the conclusion at which he arrived.

The language of section 141, is: "It shall be the duty of the assessor * * to notify * * the owners thereof, if known," and Proudfoot, J., in *Haisley v. Somers, supra*, properly regards the word "shall" in that section as being imperative and not merely directory; and at page 605 of his judgment he quotes from the judgment of Turner, L. J., in *Hughes v. Chester and Holyhead R. W. Co.*, 7 L. T. N. S. 203, in relation to statutes of this class.

The action must be dismissed, with costs. The defendant to pay to the plaintiff \$2.51, being the amount of the taxes and expenses with interest from the 3rd November, 1882.

From this judgment the plaintiff appealed to the Divisional Court, and the appeal was argued on September 6th, 1888, before BOYD, C., and PROUDFOOT and FERGUSON, JJ.

Aylesworth for the appeal. The sale took place November 3rd, 1882; the purchaser (the plaintiff) got his deed a year later, and neither sale or deed was ever questioned until this action was commenced in January, 1888. [FERGUSON J.—Can they be questioned after the lapse of two years?] That is the contention, and I think they cannot. The learned Judge who tried the case held that because through the neglect of the proper officials the defendant

Judgment.

MACMAHON,
J.

Argument. got no notice of the taxes being in arrear he had no opportunity to redeem, and that the plaintiff could not sustain the sale and that this action must be dismissed. The clerk did not return the lot as occupied. I refer to *Haisley v. Somers*, 13 O. R. 600 and 15 O. R. 275; *Smith v. The Midland R. W. Co.*, 4 O. R. 494; *Claxton v. Shibley*, 9 O. R. 451 and 10 O. R. 295. The case of *Haisley v. Somers* was wrongly applied to this case by the trial Judge, as the sale there was questioned within the two years, and *Allan v. Fisher*, 13 C. P. 63, also relied on by him, was decided in the year 1863 before the curative sections 155 and 156, as to the sale not being questioned within a certain time, were inserted in the statute. After the statutory time has elapsed, as in this case, the sale cannot be questioned: *Claxton v. Shibley*, *supra*, must govern. See judgment 9 O. R. at p. 455, where it was held that the other objections were cured by sec. 155 of R. S. O. (1877) ch. 180.

J. K. Kerr, Q.C., *contra*. The duties of the treasurer clerk and assessor are distinctly laid down in secs. 140 and 141 R. S. O., ch. 193. The omission here was not a matter of procedure but the foundation of the right to sell, and the sale was therefore invalid. In *Haisley v. Somers* it was held that it was a necessity to ascertain the least disadvantageous part to sell, and when that was not done the sale was set aside; a similarly necessary duty in this case was to ascertain whether the lot was occupied. That was not done, and the sale cannot stand. If the sale was invalid there was no sale, and it cannot be sustained under sec. 188 R. S. O., ch. 193: *Allan v. Fisher*, 13 C. P. 63; *Hughes v. Chester and Holyhead R. W. Co.*, 7 L. T. N. S. at p. 203.

Aylesworth in reply referred to *Connor v. Douglas*, 15 Gr. 456, and *Fenton v. McWain*, 41 U. C. R. 239.

December 14, 1888. PROUDFOOT, J.:—

I think the judgment correct.

I see no reason to alter the opinion I expressed in *Haisley v. Somers*, 13 O. R. 600, that notice to the owner

of the liability of the land to be sold for taxes was an essential element preliminary to the sale. The R. S. O. ch. 193, sec. 141, makes it imperative on the assessors to notify the owner, when known, of the liability of the land to be sold. Here, this was not done. Year after year the defendant and his son were assessed for the lot and paid the taxes, but no notice was given to them of any taxes assessed against the land, prior to the defendant's purchase, being unpaid. The owner was well known to the assessors, and they assessed him from time to time, and it was not necessary that he should reside in the municipality, though in fact he did reside immediately adjoining it.

In *Haisley v. Somers* the sale was questioned within two years, while in the present case more than two years had elapsed, but I do not think that makes any difference, and I refer to the case of *Deverill v. Coe*, 11 O. R. 222, and to the judgments of the late Chief Justice Sir Adam Wilson and the present Chief Justice Armour as ample authority in support of this proposition. In that case, the land was assessed as non-resident in 1879, and it was sold in 1882 for the taxes of 1879. The Court found that the clerk did deliver to the assessor for the year 1882 a copy of the list of lands furnished to the clerk by the treasurer, but the assessor neglected to return that there was any occupant upon the lands, which could easily have been done as the defendant lived on them; and the assessor neglected to notify the defendant of the liability of the land to be sold for arrears of taxes. Sir Adam Wilson, at p. 228, quotes secs. 108, 109, and 111 R. S. O. (1877), ch. 180=R. S. O. (1887), ch. 193, secs. 140, 141, and 143,—as enacted for the protection of the owners of lands, and says that "the assessors * * did not do one single act under these sections, and the defendant had no notice of the danger his land was in, and it was sold and sacrificed, as is usual, at a tax sale. * * All these provisions for the protection of the defendant, and of others situated as he was, he was deprived of getting the benefit of, in consequence of the

Judgment.
Proudfoot,
J.

Judgment.
PROUDFOOT,
J.

express notice he was entitled to receive by the plain language of the statute, being withheld from him."

In *Deverill v. Coe*, the sale was questioned within two years from the giving of the deed, but more than two years from the sale, and the case was dealt with as if the statutory two years had expired. But Sir Adam Wilson goes on to say, at p. 233: "It is true the direct notice required to be given to the person whose land is liable to be sold, is a matter of procedure, and matters of procedure are frequently said to be, if not followed, curable by secs. 155 and 156, (188 & 189). Procedure must not, however, be construed too loosely. Having a collector's roll is a matter of procedure, but it cannot be said the want of such a roll would be a curable defect. The neglect to leave a notice of assessment with the person assessed, would be a curable defect, for every one knows he has to pay his taxes yearly, and if he did not receive the notice he would know there was something wrong, and he could ascertain how the fact was. But the notice under sec. 109, (141) is a notice of a different kind. It is not the usual yearly notice which every one looks for; it is a notice which no one does, or has reason to look for, and the want of it may be attended with the most serious consequences, the loss of his land. A notice in the *Gazette* and a newspaper is nothing like the direct notice required to be given by sec. 109, (141). The want of this notice is more than an irregularity: it is a defect of really vital importance." At p. 238: "If it can be said the effect of secs. 155 & 156, (188 & 189) is to make valid all sales for taxes, so long as there are in fact taxes in arrear, notwithstanding every kind of neglect and misconduct of the municipal officers, there is nothing more to be said; but if that is not the effect of these sections, where is the point to begin at which invalidity may be set up? Can it be properly said there are taxes in arrear so as to justify the sale of the land when the party has paid all he has ever been asked to pay; and I must add, by way of qualification, when he had no reason to believe in fact there was

anything in arrear, or that there was more payable than he had paid? * * I am of opinion, however, after the fullest and most anxious consideration, that these sections do not authorize the sale of land for arrears of taxes, however great the irregularities or misconduct of the municipal officers may be; *and there are cases in which such sales may be questioned even after the lapse of two years from the time of the sale, and that the present is one of these cases.*"

Judgment.
PROUDFOOT,
J.

Chief Justice Armour thought the substantial performance of the provisions of the sections referred to, was a condition precedent to the right to sell non-resident land for taxes. That the 27 Vic. ch. 19, in which these provisions first appeared, stated in the preamble that they were for the greater protection of land owners, and it is impossible to give them such effect without construing them to be conditions precedent. If they are to be considered as merely directory, and which the officers charged with the performance of them may omit or neglect as their ease or pleasure may prompt, then the Act was idle. The township officers in the case before him wholly neglected their duty, and as they are officers of the municipality for whose benefit these taxes were to be collected, the defendants property should not be practically confiscated through their neglect. He did not think that the taxes for which the land in question was sold, could be said to be due and in arrear, so long as this condition precedent (giving notice) was unperformed in such a manner as to support the sale of the defendant's land; nor could the defendant's land be said, in the absence of the performance of this condition, to be land sold for taxes due, or for arrears of taxes within the meaning of the Assessment Act, so as to render the sale valid and binding after the intervals fixed by the Act.

That case has a striking similarity in its circumstances to the one now before us, and the judgment is applicable to this as well as to that. I entirely concur in the reasoning by which the Queen's Bench held that the want of

Judgment. notice to the defendant of the arrears, and of the liability
PROOFDOOR, of his land to be sold for them, was the want of an essen-
J. tial requisite to the power of sale arising.

FERGUSON, J.:—

The appeal is from the judgment of my brother MacMahon, before whom the case was tried without a jury, at the Assizes held at Sarnia last spring. The action is for the possession of land, and the plaintiff's title rests upon a purchase by him of the lot in question at a tax sale held on the 3rd November, 1882, and a deed of conveyance, executed pursuant to such sale by the warden and treasurer on the 11th November, 1883. This deed is to the plaintiff the purchaser at the sale.

The material facts of the case are clearly and concisely stated in the judgment of the learned Judge, and need not be repeated here at any great length.

The sale of the land was for the taxes of the year 1879, the amount of which is said to have been the small sum of seventy-five cents. The assessment roll shewed that the lot in question was assessed for the year 1879 as non-resident land. One George M. VanValkenburg was the owner up to the 27th May, 1879, when he conveyed to the defendant who paid the taxes for the year 1880, and they have been paid for every year since that time.

This action was commenced in the month of January of the present year, 1888, and it does not appear that the deed was questioned before any Court of competent jurisdiction by any person interested in the lands before that time, or that any legal proceedings were had in regard to it, until this suit was brought. The defendant says that the first he heard of his lot having been sold for taxes was in the latter part of the year 1886. It seems to have been assumed that there were no legal proceedings of any kind regarding the validity or not of this deed to the plaintiff, until this action was commenced, and this may, I think, taken to be the fact.

It then appears that a period of more than four years elapsed after the making of this deed before the same was questioned, as mentioned in section 156 of the Assessment Act, ch. 180, R. S. O. (1877). Judgment.
FERGUSON, J.

It seems now to be settled, that the two years mentioned in this section are to be reckoned from the time of the making of the deed pursuant to the sale for taxes, and not from the time of the sale itself. In the present case, however, any difference of opinion on the subject would be immaterial, because so long a period elapsed after both events before any question was raised in the manner mentioned in the section.

The county treasurer said, that the list mentioned in sec. 109 of the Act was sent to the village clerk of the village, in which the lot in question is situated, and at the trial it was agreed to be admitted and was, as I understand, admitted that this list was duly received by the clerk. There appears to have been a change of clerks, and it is admitted that this list was lost.

The basis on which the case was argued before us was that either the clerk did not deliver to the assessor a copy of the list, as required by the same section (109), or that the assessor neglected to visit the lot in question, and ascertain (as he would have ascertained) that it was occupied, and to notify the occupant, &c., that the lot was liable to be sold for arrears of taxes, as required by the same section. In either case it seems clear, that the defendant did not receive the notice provided for by the statute that his lands were liable to be sold for arrears of taxes.

The learned Judge finds, that the defendant never received any notice that his lot was liable to be sold for taxes, either on his assessment notice or at any other time, and following the case *Haisley v. Somers*, 13 O. R. 600, held that the neglect to give this notice was not cured by sec. 155 of the Act, and dismissed the plaintiff's action with costs. He does not seem, however, to have considered the effect upon the case of sec. 156 of the Act.

Judgment.

FERGUSON, J. It does not seem to be disputed, that this lot was mentioned in the list sent by the treasurer to the clerk of the village under the provisions of the 158th section of the Act. It seems also undisputed, that the lot was not returned to the treasurer as being occupied under the provisions of the 111th section of the Act, and, if sec. 130 of the Act is read literally the treasurer was not by it forbidden to sell the lot. It is also undisputed that the taxes for which the lot was sold had been properly imposed, and were in arrear the specified period, and were unpaid.

In the case *Fenton v. McWain*, 41 U. C. R. 239, the land was put upon the non-resident in place of the resident roll, and the list of lands liable to be sold, required by the statute to be sealed with the corporate seal, and signed by the warden, and to be returned to the treasurer with the warrant for the sale annexed was not so sealed or signed or returned, and it was held that the land could be sold under the Act then in force (32 Vic. ch. 36, sec. 128), and that the placing of the land on the wrong list, and the omission to authenticate and return the list were defects cured by sec. 155 of that Act (which was the same as the sec. 156 above mentioned) more than two years having elapsed after the execution of the tax deed, and before the suit was commenced. But that where no list was sent by the treasurer to the clerk of the land, in respect of which the taxes were in arrear as required by sec. 110 of the Act, the sale was not authorized, and it was not made valid by either sec. 130 or 155 of that Act. That sec. 130 comprehended in effect if not literally secs. 127 and 155 of ch. 180 R. S. O. (1877); and that sec. 155 the same in effect as sec. 156 before mentioned, the reason of the latter branch of the decision being that it was enacted by sec. 131, that the treasurer should not sell any lands which were not included in such lists.

This case certainly decides that the then sec. 155, which is in effect the same as sec. 156, ch. 180, aforesaid, will not cure or operate as a statute of limitations in a case where the sale by the treasurer is forbidden by the statute. The

section of ch. 180 which forbids a sale by the treasurer is Judgment
sec. 130.

FERGUSON, J.

In the very recent case *Donovan v. Hogan*, in the Court of Appeal, not yet reported (a), Mr. Justice Patterson, in delivering judgment (p. 449) says: "The literal reading of sec. 130 is that the treasurer is not to sell lands returned as occupied; but to confine the effect of the prohibition to lands so returned, and not to extend it to lands that ought to have been so returned, is, in my judgment, to adhere to the letter and lose sight of the spirit and true effect of the provision. These, I take to be, that lands which have become occupied and on which there is distress sufficient to satisfy the taxes, are not to be sold. The form of the enactment is the assignment to each officer of his duty in respect of the land, the effect of the whole being that occupied land is not to be sold without an effort to collect the taxes."

The learned Judge then refers to the penalties that are affixed to the neglect of duty by the assessor and the clerk, and says that he sees no good reason for inferring from the imposition of these penalties that the duties are directory only, and not essential to the liability of the lands to be sold.

In the same case Mr. Justice Osler says (p. 455): "The transmission of the list as a preparatory step to obtaining payment of the taxes for the local municipality, by a sale of the land, would be a useless formality unless the officers of the municipality comply with the requirements of secs. 109-111. If the object to be attained is regarded, their duties are quite as little matters of procedure as the initial act of the treasurer in transmitting the list."

In the same case the learned Chief Justice said (p. 439): "In the case of a vital statutable provision causing the whole damage, as in the case before us, I cannot see any sound distinction between the rank of different functionaries by whom the general machinery of the law is worked. Nor can I consent to condone the neglect of the township sub-

(a) Since reported, 15 A. R. 432.

Judgment. ordinate of a duty which would be unpardonable if committed in the loftier atmosphere of the county official.”
FERGUSON, J.

Mr. Justice Burton, in the same case, expresses an opinion differing from these views of the other Judges.

The case, however, was not one involving the consideration of section 156, as the period of two years had not elapsed after the tax deed and before suit; and the Court was unanimous in its judgment.

Mr. Justice Patterson also indorsed to the full extent the view expressed by Chief Justice Armour in the case of *Deverill v. Coe*, 11 O. R. 240, 241.

In the case of *Smith v. The Midland R. W. Co.*, 4 O. R. 499, the learned Chancellor states a view coincident, or nearly so, with that expressed by Mr. Justice Burton, in *Donovan v. Hogan*, *supra*, and at variance with that expressed by the other Judges of the Court of Appeal.

The decision in *Fenton v. McWain*, *supra*, shows that this section is not in all cases conclusive against the owner of the land, where the tax deed has not been questioned as mentioned in the section within two years after its execution; and that the case where a sale by the treasurer is forbidden by the Act, is one in which the section is not conclusive against the owner.

Such a sale is forbidden by section 130. where the lands have been returned as “being occupied.” According to the view so clearly expressed by Mr. Justice Patterson in *Donovan v. Hogan*, before referred to, where the lands have become occupied, and there is distress on them sufficient to satisfy the taxes, they are, as regards their being liable to be sold for taxes, in the same position as if they had been returned “occupied;” and according to the view stated by Mr. Justice Osler, the performance of their duties by the officers of the township or village, are, in regard to the same matter, as important as the initial act of the treasurer in transmitting the lists; and the learned Chief Justice seems to entertain the same view. If the list had not been transmitted, there could have been no proper sale of the land, and the case would have fallen directly under

the authority of *Fenton v. McWain*, as a case in which Judgment such a sale was forbidden by statute.

FERGUSON, J.

It may be said that the opinions of the learned Judges of the Court of Appeal, to which I have referred, were not necessary for the decision of the case before the Court. Yet there seems a very pointed and strong concurrence of three of these Judges, the view of Mr. Justice Patterson, apparently embracing the whole ground of the difficulty before me, and so far as I can perceive, sustained by the opinions of the other two. According to this view lands that have become occupied, and have upon them sufficient distress to satisfy the taxes should, notwithstanding the errors, mistakes, and blunders of officers of the municipality, be considered as if they had been returned "occupied;" and if so, the sale is forbidden by section 130: then according to the view stated in *Fenton v. McWain*, on p. 248, the lands could no more be sold for arrears of taxes, than if they had not been included in the list of lands to be sold attached to the warrant to sell.

Such lands were the lands in the present case, and not being at all free from doubt owing to the different views of learned Judges to which I have referred, and admitting that I entertained a different view at the close of the argument, I arrive at the conclusion that the errors and mistakes of the officers that have been mentioned are not, notwithstanding the long lapse of time after the making of the deed, and before suit, in connexion with which it should be mentioned that the defendant was in possession, cured by section 156 of the Act, and that the judgment of my brother MacMahon should be affirmed.

BOYD, C. :—

The tax deed in this case was made in 1883, and was not questioned till five years afterwards, in this action. As against the objection raised that sec. 141 of the Assessment Act was not complied with (R. S. O. ch. 193), I think that omission was cured by sec. 189, and now

Judgment.

BOYD, C.

the deed is valid and binding to all intents and purposes. That section is in the nature of a Statute of Limitations as to such objections, and I suppose it is to be read in the light of the interpretation Act so as to best insure the obtainment of the object of the Act (R. S. O. ch. 1, sec. 8, sub-sec. 39). I have already expressed my opinion on this very matter in *Smith v. Midland*, 4 O. R. 494, and nothing that was advanced during the argument has induced me to change the views I there expressed. The decision relied on by Mr. Justice MacMahon of *Haisley v. Somers*, 13 O. R. 600, does not appear to be in point, as the deed and sale there attacked were not within the present sec. 189, the two years not having elapsed. There the sale was on 3rd December, 1884, the deed on December 5th, 1884, and the writ in the action issued November 28th, 1885.

This is probably a very hard case upon the defendant, but I cannot allow this consideration to interfere with the plain meaning of the statute, which appears to preclude any relief being given to the defendant in this action.

I think, therefore, that the decision should be reversed, and judgment entered for the plaintiff, with costs.

I do not regret that the majority of the Court is able to decide as it does in this particular case—abstract justice will doubtless be better served by the success of the original owner of the land. Nevertheless, this result appears to me to be reached, by giving a construction to section 163 of the present Assessment Act (sec. 130 in the former revision) which in effect adds to the language of the statute, and in so far invades the distinction which ought to obtain between making and administering law. Whatever latitude may have existed in former days when statutes were “short and far between,” no such liberality of construction should now be allowed, as to introduce words and clauses not found in the text, in order to give a better or more symmetrical meaning, or to extend the remedy. The proper legislative organ is occupied yearly in promulgating and amending law, and where it is so easy for the framers

of a statute to add what may have been omitted it seems to me not of judicial competence to interfere, by way of substitution for the legislature, in any particular instance.

Judgment.
BOND, C.

G. A. B.

[CHANCERY DIVISION.]

RE ST. PHILLIP'S CHURCH, WESTON, AND THE GLASGOW
AND LONDON INSURANCE CO.

Insurance—Policy effected before R. S. O. 1887—Appraisement—Arbitration—Costs—R. S. O. 1877, ch. 162 ; R. S. O. ch. 167, sec. 114.

A church was insured under a three years' policy on November 14th, 1885, and was destroyed by fire May 31st, 1888. The insurance company admitted the loss, but required the damages to be proved, and a submission to appraisers was entered into by the parties, in which it was provided that "the award made by them [the appraisers], or any two of them, shall be binding upon both of said parties as the amount of such damage to said insured property, but shall not determine any question touching the legal liability of said company," etc. Two of the appraisers joined in an award giving the insured the full amount claimed, and ordered the company to pay the costs of the reference and award. The company refused to pay any costs over and above half the arbitrators fees.

Held (affirming the Master in Chambers), that R. S. O. 1887, ch. 167, sec. 114, was applicable to the policy in question, and that the Legislature intended, by the use of the words, "or otherwise in force in Ontario, with respect to any property therein," that section to be applicable to all policies existing at the time the Act came into force, and that costs were properly awarded under subsec. 16 of that section.

THIS was an appeal from a judgment of the Master in Chambers.

It appeared that St. Phillip's Church in the village of Weston, was insured in the Glasgow and London Insurance Company on November 13th, 1885, for three years, and was destroyed by fire on May 31st, 1888. The company admitted the claim but requested the churchwardens to prove the amount of the loss.

An agreement for submission to appraisers was signed by the churchwardens and the company; referring the

Statement.

amount of loss to them and a third appraiser. The parties of this agreement material to the case were as follows :

It is hereby agreed by the trustees or wardens of St. Phillip's Church, Weston, Ontario, of the first part, and the Glasgow and London Insurance Company, and such other Insurance Companies as sign this agreement of the second part, that W. G. Boon and W. Tyrrell, shall appraise in detail and specifically, at net cash value, the immediate and actual damage resulting from the fire occurring on the 31st day of May, A.D. 1888, to the property of the said party of the first part, insured by said companies and found saved in a damaged condition. It is also agreed that in the event that the above named appraisers do not agree as to the damage, they shall select a third person who is not interested, either directly or indirectly partner, creditor or otherwise, or related to the assured, and the award made by them, or any two of them shall be binding upon both of said parties as to the amount of such damage to said insured property, but shall not determine any question touching the legal liability of said company, nor shall this agreement waive any of their rights under the existing covenants. The property on which damage is to be estimated and appraised is the St. Phillip's Church, Weston, Ontario.

Messrs. Boon and Tyrrell not being able to agree, Mr. Stephenson was appointed third appraiser.

Messrs. Stephenson and Tyrrell made an award giving to the churchwardens the full amount mentioned in the policy, and the award also contained the following clause :

And we further award and determine that the Glasgow and London Insurance Company, should pay to the wardens or trustees of St. Phillip's Church, Weston, the cost of the reference, and also of the award, as soon as the amount of such costs have been ascertained and fixed in the proper manner.

Mr. Boon, the company's arbitrator, refused to sign the award.

The company subsequently refused to pay any costs connected with the arbitration, and declined to pay more than one-half the arbitrators fees. The churchwardens applied to the Master in Chambers, and obtained an ex parte order referring their bill to taxation.

The company moved before the Master in Chambers on the 28th January, 1889, to set aside this ex parte order on the ground that the persons appointed to determine the value of the property had no authority to award costs, and that there was no arbitration but only an appraisement.

Geo. M. Rae, for the company. The policy under which the insurance was effected, was issued previous to the passing of the Ontario Insurance Act, R. S. O. 1887, ch. 167, and has not been renewed since. It is governed by R. S. O. 1877, ch. 162, and not by R. S. O. 1887, ch. 167. The submission being silent as to costs, the appraisers had no power to award costs. There was no reference to arbitration, merely an appraisement as to values. Argument.

Lockhart Gordon, for the churchwardens. There was a reference to arbitration. The award made thereon specifically gave costs, and the churchwardens are entitled to costs, under R. S. O. 1887, ch. 167, sec. 114, sub-sec. 16.

January 31, 1889. THE MASTER IN CHAMBERS. :—

The gentlemen who acted between the Insurance Company and St. Phillip's Church, seem to be called indifferently appraisers or arbitrators—appraisers they are since their duty was to affix a price. As to their true position, however, and the legal incidents of their office, I think they are arbitrators.

These arbitrators have fixed a value which goes beyond the amount of the insurance; and they have further ordered that the insurance company do pay to the trustees of the Church the costs of the reference and of the award, as soon as the amount shall have been ascertained in the proper manner.

It is the latter part of this finding that is objected to. I think it is good.

The reference to these arbitrators gives no express powers to determine about costs. The right is entirely statutory.

R. S. O. 1877, ch. 162, sec. 3. declares that the conditions set forth in the schedule to that Act should, as against the insurers, be deemed to be part of every policy of fire insurance thereafter entered into, or renewed, or otherwise in force in Ontario with respect to any property therein, and should be printed on every such policy, &c.

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CHAMBERS.

The sixteenth condition of the conditions referred to provides for arbitration (just such a board as was appointed in this case) in case of difference as to the value of the property insured, of the property saved, or the amount of the loss. The award of the majority of the arbitrators to be conclusive as to the amount of the loss. There was no provision made as to costs of the proceeding, or power to the arbitrators to direct as to them.

Then came the Act of 1882, 45 Vic. ch. 20, sec. 3. The effect of this was to bring a mere verbal insurance without writing within the Act.

Then came the Act of 1887. It repealed the old revised Act of 1877, introducing some amendments into the system. This Act came into force as respects the policy in question here on 31st December, 1887. The fire did not occur until May, 1888. This Act is just as contained in the present Revised Statutes of 1887.

Section 114 R. S. O. 1887, ch. 167, applies the conditions to every contract of fire insurance whether sealed, written, or oral, hereafter (1) entered into, or (2) renewed or (3) otherwise in force in Ontario &c. Then the conditions of the R. S. O., 1887 Act, ch. 167, provide for arbitration just as has been pursued here, and the amended conditions taken from the Act of 1887, provide that when the full amount of the claim is awarded the costs shall follow the event, and in other cases all questions of costs shall be in the discretion of the arbitrators. The full amount of the claim was awarded here.

I do not doubt that this condition applies to the policy in question, because the policy was in force, under the Act of 1887, for six months before the fire. The condition is substantially the same as the condition of the old Revised Statute, there is a mere alteration as to a subordinate matter of procedure.

What is very consistent with this opinion is that the Act 1887, was brought into effect on the 30th June, 1888, except that sections 114 to 116 should not take effect as respects insurance companies which had their head

office in Great Britain or Ireland until 31st December, 1887. It was manifestly meant to apply to every existing policy which continued in force after the coming into force of the Act, and this last mentioned provision is an additional proof that that is so.

Judgment.
MASTER J.
CHAMBERS.

Motion refused, with costs.

From this judgment the company appealed, and the appeal was argued on February 4th, 1889, before FERGUSON, J.

Rae, for the appeal. There was no reference, merely an appraisalment, and the arbitrators had no power to award costs: *Mosley v. Simpson*, L. R. 16 Eq. at p. 226. As to difference between appraisements and arbitrations, see *Russell* on Awards, 6th ed., 232.

Lockhart Gordon, mentioned to the Court that he contended the churchwardens were entitled to costs under R. S. O. 1887, ch. 167, sec. 114, as the words "otherwise in force in Ontario" covered all policies in existence at the time of the passing of the Act.

Rae. Those words only had reference to insurances in force otherwise than by virtue of a policy issued. In the conditions existing at the time this policy was issued there was no provision as to costs, and the Legislature never intended by the Revised Statutes of 1887, to impose such an additional term on policies issued prior to the Act, which had not been renewed since. The parties appointed were valuers, merely to ascertain the amount, not arbitrators to settle a dispute: *Collins v. Collins*, 26 Beav. 306; *Bos v. Helsham* L. R. 2 Ex. 72; *Re Hopper and Wrightson*, L. R. 2 Q. B. 367; *Re Dawdy and Hartcup*, 15 Q. B. D. 426; *Leeds v. Burroughs*, 12 East 1; *Wimshurst v. Barrow Ship Building Co.*, 2 Q. B. D. 335.

Lockhart Gordon, was not called upon.

FERGUSON, J., [at the close of the argument.] :—

I think this appeal must be dismissed. The policy in question was issued in Ontario, covering property in

Judgment. Ontario, subject to the Ontario statutory conditions.
Ferguson, J. The 16th sub-section of sec. 114 R. S. O. 1887, ch. 167 must be held to be applicable to it. I have no doubt that the parties intended the reference in this case to be the reference provided for by the statutory conditions, and that the procedure in connection with this reference must be governed by the sub-section last above mentioned. I have no doubt that the Legislature intended that the 114th section should be applicable to all policies of insurance existing at the time the Act came into force. The words "or otherwise in force in Ontario with respect to any property therein," brought this within the operation of the Act.

There may be in the cases cited by Mr. Rae, a distinction drawn between valuations and arbitrations, but I do not consider this distinction applicable to the present case.

Appeal dismissed, with costs.

G. A. B.

[CHANCERY DIVISION.]

MALONE V. MALONE ET AL.

Dower—Parties—Devolution of Estates Act, R. S. O. ch. 108—Demand—Damages—Costs.

M. M. made his will April 13th, 1888, devising his farm to his two sons, appointed the defendants his executors, and died May 21st, 1888. In an action of dower by the widow of M. M. against the executors, in which they set up that the sons were the tenants of the freehold, and should be made parties. It was

Held, that since the Devolution of Estates Act R. S. O. ch. 108, sec. 4, devisees are not necessary parties to an action for dower,

Held, also, that as no demand was made, although the plaintiff was entitled to judgment of *seisin*, it should be without costs; and as defendants were always ready and willing to assign the dower, plaintiff was not entitled to damages for detention.

THIS was an action of dower brought by Catharine Statement.
Malone, as widow of Michael Malone, against Denis Malone
and Michael McGrath, as executors of the said Michael
Malone.

The testator died on May 21st, 1888, after having made his will dated April 13th, 1888, by which he devised his farm to his two sons, and gave his wife an annuity of \$125 a year in lieu of dower. The widow elected to take her dower in preference to the annuity, and brought this action for same, and asked for damages for its detention.*

The executors set up by way of defence that no demand of dower had been made; that they were always ready and willing to assign the dower, and that the testator's two sons (the devisees of the land under the will) were the tenants of the freehold, and should be made parties.

The action came on to be heard on the pleadings on December 12th, 1888, before Robertson, J.

Anglin, for the plaintiff. The widow has elected to take her dower, and is entitled to have it assigned, and to re-

*The testator died May 21st, 1888. His will was proved July 7th, 1888, Widow elected against the annuity October 17th, 1888, and writ was issued November 2nd, 1888.—REP.

Argument. cover damages for its detention: *Cameron* on *Dower*, p. 300, sec. 15, p. 303, sec. 3; p. 501, sec. 5; p. 514, sec. 25; p. 516, secs. 27 and 30; *Cameron v. Gilchrist*, 7 P. R. 184; *Harvey v. Pearsall*, 31 C. P. 239; *Cook v. Philips*, 23 U. C. R. 69; *Grieve v. Woodruff*, 1 A. R. 617; *Watson v. Watson*, 20 L. J. C. P. (N. S.) 25. The property has become vested in the executors under the Devolution of Estates Act and they are the proper parties against whom to bring the action: R. S. O. ch. 108, secs. 4 and 9; *Low v. Sparks*, 14 C. P. 25; Con. Rule 411. As to costs, I refer to *Cameron* p. 534, sec. 13; p. 536, secs. 21 and 22; *Grieve v. Woodruff* *supra*: *Harris v. Harris*, 11 W. R. 62; Con. Rules 290, 291.

Kappele, for the executors. The defendants submit their rights to the direction of the Court. They have no beneficial interest. The devisees under the will are entitled to the land, and have to pay anything to which the plaintiff is entitled, and they are not before the Court as parties.

January 25, 1889. ROBERTSON, J.:—

This is an action to recover dower. The plaintiff is the widow of the late Michael Malone, who died seized of lot No. 16, in 10th concession of the township of Brock. The defendants are his executors.

The will bears date the 13th April, 1888, and the testator died on or about the 21st May, 1888, and by his will he devised the land in question to his two sons in equal portions, subject to an annuity in favour of the widow, the plaintiff, of \$125 per annum in lieu of dower. The plaintiff has elected against the will, and claims her dower, and damages for the detention thereof.

The defendants plead: 1st. Denial of detention of dower and say that they have always been, and still are ready and willing to assign to plaintiff her said dower, &c. 2nd. They submit that the devisees Michael Malone and John Malone, are tenants of the freehold, and are necessary parties, &c.

The case was set down on the pleadings by the plaintiff, ^{Judgment} and judgment of *seisin* is asked, and a reference to the ^{ROBERTSON, J.} Master to assess damages for detention of dower, and in the alternative to judgment of *seisin*: that the defendants be ordered to pay a gross sum in lieu of dower, &c.

As to the necessity of making Michael and John Malone defendants, I am of opinion now, since the Devolution of Estates Act, that these devisees are not proper parties, at all events they are not necessary parties. The estate in the lands has devolved to the personal representatives of the person who died seised, and for all the purposes of this action they are the proper parties defendants.

Then as to the question raised by the first defence, which is equivalent to the old plea of *tout temps prist*. I think the defendants are entitled to judgment. There never was any demand of dower, and until that is made, and non-compliance proved, plaintiff is not entitled to damages. It is necessary that plaintiff should make a demand to have her dower set apart. The defendants are rightly in possession, and the dowress would not be, until her dower has been assigned to her; but upon a demand the dowress and the tenants of the freehold may, by any instrument under their hands and seals executed in presence of two witnesses, agree upon the assignment of dower, or upon a yearly sum, or a gross sum to be paid in lieu and satisfaction of dower, &c.: R. S. O. ch. 56, sec. 4.

So far as I can see, there was no necessity for these proceedings. The plaintiff is entitled to judgment of *seisin*, but without costs; and as defendants have always been ready and willing, and are still willing to assign her dower is not entitled to damages.

Besides the cases cited on the argument, I have referred to a very interesting case, which warrants me in coming to the conclusion I have arrived at: *Bishoprick v. Pearce*, 12 U. C. R. 306.

G. A. B.

[CHANCERY DIVISION.]

MACDONELL V. BLAKE ET AL.

Law Society—"Retired judge"—*Ex officio* benchers—R. S. O. [1877], ch. 138, sec. 4.

A Judge of one of the Superior Courts of this Province, who resigns his office without superannuation, under R. S. C., ch. 138, sec. 14, and who resumes the practice of the law, is a "retired Judge" within the meaning of R. S. O. [1877], ch. 138, sec. 4, and as such is an *ex officio* Bencher of the Law Society of Upper Canada.

Statement.

THIS was an action brought by John Alexander Macdonell against Samuel Hume Blake and the Law Society of Upper Canada, for an injunction to prevent the defendant Blake from acting as an *ex officio* Bencher, and to restrain the Law Society from permitting him so to act.

The statement of claim set out that the defendant Blake was appointed a Vice-Chancellor of the Province of Ontario on December 2nd, 1872; that he resigned said office on May 9th, 1881; that his resignation was accepted on May 18th, 1881; that he then returned to the active practice of his profession, and was still practising; and that he assumed to sit and act as a Bencher of the Law Society, *ex officio*.

The statement of defence of the defendant Blake admitted the statement of claim, and submitted that in virtue of the statutes in that behalf, he was an *ex officio* Bencher and qualified to act as such.

The statement of defence of the Law Society alleged the resignation of the office of Vice-Chancellor of Ontario by the defendant Blake, and that he acted as Bencher under and pursuant to sec. 4 of ch. 138, R. S. O. (1877) which provides that, among others, any "retired Judge" of the Superior Courts of Law or Equity for Ontario shall be an *ex officio* Bencher; that the Society believed he was so entitled to act, and submitted to be guided by the opinion of the Court.

The action was entered for trial at the Sittings held Statement. in Toronto in November, 1888, before Boyd, C., but was by consent of counsel for all parties adjourned to be argued before the Divisional Court.

The action subsequently came on before the Divisional Court on February 28th, 1889, and was argued before PROUDFOOT, FERGUSON, and ROBERTSON, JJ.

James Reeve, for the plaintiff. The object of the suit is to get an interpretation of sec. 4 of ch. 138 R. S. O. (1877), as to whether the defendant Blake is a *retired* Judge within the meaning of that section. The only sense in which he can claim is that he has resigned. R. S. O. ch. 44, sec. 9, defines in what sense the words "retired Judge" are used. When Mr. Blake resigned his office as Vice-Chancellor with the avowed object of resuming the active practice of his profession as a barrister and solicitor, he was not a retired Judge in that sense. There are three cases which might occur. 1. Service as a Judge for sufficient time to entitle the Judge to a pension and retirement with a pension. 2. Service not long enough to entitle the Judge to a pension and real retirement into private life. 3. Resignation and retirement from the office, but resumption of active practice. The last is this case, and it was not contemplated by the Legislature, and should not be so construed. It is not sufficient for the defendant Blake to bring himself within the mere words of the section but he must come within the meaning and intention of the Legislature: *Maxwell* on the Interpretation of Statutes, 2nd ed. 24. As to how words which are ambiguous or capable of various meanings are to be understood so as to harmonize with the subject of the enactment: See *Maxwell*, p. 28. To *retire* is to withdraw from active life. The wording of the provision as to the Attorney-General is "one who *has held* the office" in the very section under consideration. If the Legislature intended to include all who *had been* Judges it would have said so in the same way. The defendant does not come within R. S. C. ch. 138, sec. 14, nor should he in

Argument. his capacity as a retired Judge sit or act as a Judge under R. S. O. ch. 44, sec. 9, nor could a Judge who had resigned and gone into mercantile pursuits act under that section. The words must be understood in the sense in which they would best agree with the object of the Legislature: *Maxwell*, 4 Ex. D. 38. I refer also to *Caledonian R. W. Co. v. North British R. Co.*, 6 App. Cas. 126; *Wood v. Priestner*, L. R. 2 Ex. 68; *Jarman on Wills*, 4th ed. 422.

Lount, Q.C., *Reeve*, Q.C. and *Walter Read* for the Law Society. The defendant Blake has retired from a public office to private life, and practices in his profession in private life, as he has a right to do, but he is nevertheless a retired Judge. In sections 14 and 16 of R. S. C. ch. 138, there is no distinction between Judges who resign before or after fifteen years service. In sec. 14 the word "resign" is used. In sec. 16, the allowances to the resigned Judges are called "retiring allowances." R. S. O. (1877) ch. 138, sec. 4 does not provide that those who retire to private life shall be benchers, but rather the converse, as for instance the Attorney-General "if a member of the bar of Ontario." If the Legislature intended to exclude a Judge who returned to active practice it would have said so. The Hon. Mr. Mowbray, the present Attorney-General of Ontario, resigned from one of the Superior Courts of Ontario after the passing of the original statute 34 Vic. ch. 15, sec. 4 (O.), and the Legislature with that case before it, re-enacted the same provision in R. S. O. 1877, ch. 138, sec. 4: then the present defendant Blake also resigned and the Legislature with two existing instances re-enacted the provision in R. S. O. 1887, ch. 145, sec. 4. There is no conflict of duty between a retired Judge, who is practising and a Bencher. I refer to *Ex parte Huggins*, 21 Ch. D. 85; *Churchill v. Denny*, L. R. 20 Eq. 534; *Wilcock v. Terrell*, 3 Ex. D. 38.

H. Cassels, for the defendant Blake. Mr. Blake became a retired Judge when he left his position on the bench. The designation *retired*, is a relative term. Having regard to Mr. Blake's connection with the bench, he is a retired Judge; having regard to his connection with other positions

a dozen different adjectives may be correctly used. The **Argument** statute providing for the appointment of Judges, requires them to be, when selected, following a particular profession, and to have followed that profession for a period of years. The statute in question requires merely that the person designated shall have occupied and retired from the bench, and does not provide that upon retirement, any particular pursuit in life should be followed. The moment Mr. Blake left the bench he was a *retired* Judge, and therefore *ex officio* a Benchers of the Law Society; and the statute does not provide that *ex officio* Benchers shall, on the happening of any event, cease to hold that office. Mr. Blake is none the less a *retired* Judge, because he resigned his office. The words *resigned* and *retired* are used as correlative terms. *Resignation* is the act of the individual by which he becomes *retired*.

March 5, 1889. PROUDFOOT, J. :—

The only question to be decided in this action is : Is there any difference between a retired and a resigned Judge? It seems to me that there is none. In order to retire, a Judge must resign. The Dominion Statute R. S. C. ch. 138, sec. 14 providing for the retiring allowance to Judges, uses the word "resign," and provides that Her Majesty may grant retiring allowances, and a perusal of that section and section 16, satisfies me that the words "retired" and "resigned," when applied to a Judge who has given up his position on the bench are equivalent. It has been argued that the defendant Blake's position as *ex officio* Benchers by virtue of his having been a Judge, is inconsistent with his resuming the active practice of his profession; and that so to speak, he should remain retired. I am not pressed with that contention as it is a matter of common notoriety that the body of the Benchers are practitioners, and it is better that such should be the case, as they are thus in a better position to judge of the requirements of the profession and manage the Law Society in a way to meet those

Judgment. requirements. On the whole case, I arrive at the conclusion that there is no ground for this action, and it should be dismissed with costs.

FERGUSON, J. :—

I am of the same opinion. After the fullest consideration of the able argument of the counsel for the plaintiff I fail to see any ground or authority against the defendant's position as Benchers. The word "retired," is applicable to him as "resigned," in connection with having given up his position as a Judge. It does appear to me that the plaintiff has any standing ground in this action. The provision has been retained in the Revised Statutes of Ontario, 1887, ch. 145, sec. 4, in almost the identical words of the revision of 1877, ch. 138, sec. 4, and if the Legislature had seen fit they could have provided by Legislation for the case, there being then in existence two instances, viz.: that of the defendant and the present Attorney-General of the Province, each of whom resigned the position of Vice-Chancellor. I have no doubt at all that the plaintiff is not entitled to succeed in this action, which must, I think, be dismissed with costs.

ROBERTSON, J. :—

I am of opinion that the defendant Blake comes within the provision of the statute, and that he is, in the sense therein meant, and contemplated by the Legislature, a "retired Judge," and being such is *ex officio* a Benchers of the Law Society. I can see no reason for making a difference between a Judge who retires from the bench into an inactive life, and one who leaves the bench with the express intent of resuming practice. While a Judge he is a "visitor" of the Society: when he ceases to be a Judge he becomes *ex officio* a Benchers, and the change follows instantaneously upon the cessation of the other.

According to the contention of the plaintiff it is admitted

that if the retired Judge did not resume practice the statute ^{Judgment.} would apply; so that if within say one or two years after ^{ROBERTSON, J..} a Judge retires from the bench, he having so retired with the full intention of not resuming practice, should change his mind in that respect it is clear that during the time of non-practice he is to all intents a properly qualified Benchman. What then is there in the statute to disqualify him on resuming practice? It is no disqualification being in practice; in fact the reform brought about by the statute of 1871, 34 Vic. ch. 15 (O.), was to correct in some degree what was then considered a defect in the system, that is the selecting of Benchmen by the Benchmen, not from among the young and active members of the profession, but from among those who might be considered rather to have withdrawn from the more active body.

Then it is clear that our Attorney-General of Ontario is *ex officio* a Benchman, and having once been Attorney-General, he continues to be *ex officio* a Benchman, whether he resumes the practice of his profession or not. What reason is there then for construing that statute differently in the case of a retired Judge? It cannot be for want of qualification; in fact, as before stated, as a practitioner he comes more within the provision of the Act: he is then to all intents and purposes a member of the Society, and being qualified as a voter, he is qualified to be elected a Benchman.

I think the action should be dismissed with costs.

NOTE.—The Hon. OLIVER MOWAT resigned his position of Vice-Chancellor on October 23rd, 1872, and resumed practice. He at present sits as an *ex officio* Benchman, but may qualify by virtue of his office as Attorney-General in addition to his position as a retired Judge.—R&P.

G. A. B.

[CHANCERY DIVISION.]

RE CENTRAL BANK.

J. D. HENDERSON'S CASE.

Company—Banks and Banking—Winding up—Contributories—Liquidators—Illegal trafficking in shares—Transfers within one month of suspension—R. S. C. ch. 130, sec. 45, 77—R. S. C. ch. 129, sec. 45.

H., having been placed on the list of contributories in the winding up proceedings of the Central Bank, appealed on the ground that the transfer of his shares was a fraudulent transaction, in view of R. S. C. ch. 130, sec. 45, since the bank was trafficking in its own shares for the purpose of keeping up the appearance of *bond fide* sales, and so enhancing the market price of its shares, and took the appellant's notes in payment for his shares, undertaking not to enforce them, but to deliver them up upon a re-sale being effected, which transactions were *ultra vires* of the bank.

Held, that this was no defence as against the liquidators, who represent the creditors as well as the bank.

H. also appealed as to certain of the shares upon the ground that he had acquired them within one month before the suspension of the bank, and also on the ground that those who had transferred these shares to him should also have been placed on the list of contributories, though that themselves had only acquired the shares within the said month.

Held, that H. was rightly on the list as to these shares, but that his transferors should also be placed upon it, and the report was referred back to the Master for this purpose, although the liquidators had not objected to the report.

Liquidators are officers of the Court, and the matter being brought to the notice of the Court on the appeal, it was the duty of the Court to protect the interest of the creditors and all parties concerned, and to see that all were charged who were legally chargeable.

Statement.

THIS was an appeal from the certificate of the Master in Ordinary whereby he had placed the appellant, J. D. Henderson, upon the list of contributories of the Central Bank in regard to 102 shares of the capital stock, under circumstances which were afterwards set out by Robertson, before whom this appeal was argued, in his judgment, as follows :

This is an appeal from the order or certificate of the Master in Ordinary placing the appellant J. D. Henderson on the list of contributories in regard to 102 shares of the capital stock of the bank, as follows :

Class 1 consists of persons who were shareholders in *Statement* the bank in their own right, at the date of the winding-up order, dated December 3rd, 1887, and who are liable as contributories in respect of the number of shares, and for the amounts set opposite their respective names.

Part 1.—Persons who were such shareholders prior to October 15th, 1887, and continued to be and were such shareholders up to December 3rd, 1887 :

Henderson, J. D., Toronto, 15 shares—\$1,500.

Part 2.—Persons who acquired their shares and became shareholders after October 15th, 1887, and who were such shareholders at the date of such winding-up order :

Henderson, J. D., Toronto, 87 shares—\$8,700.

The defence set up by Mr. Henderson is one in confession and avoidance, and he particularizes as follows :

1. That he acted for, at the request of and as agent of the said bank in acquiring and holding the shares, or a portion thereof, in respect of which he is placed upon the said list.

2. The said bank was the real owner of the said shares, or a portion thereof, and the said Henderson has not now and never had any beneficial interest whatever in the same.

3. If it should be held that he acquired the said shares or any of them under circumstances that render him liable to be placed upon the said list, then he says the said bank by its cashier and manager, acting within the scope of his authority, and for the purpose of enhancing the apparent value of its stock and benefitting the said bank, upon being applied to for information by the said Henderson, misled and deceived him upon his treaty for purchasing the said stock, or a portion thereof, and before purchasing the same, by misrepresenting and concealing the financial condition of the said bank and the value of its stock and shares and the amount of dividend its earnings would justify the payment of, and the financial condition and prospects of the said bank, and the nature of its investments and of the securities held for the same, and the profits to be derived therefrom, and otherwise and in other ways the said bank, through its officer aforesaid, well knowing the said representations to be false, and that they would be acted upon by the said Henderson, and would induce him to conclude a contract then in treaty for the purchase of the said stock, and the said Henderson, believing such representation to be true, and that the truth was fully disclosed to him, purchased the said stock under circumstances which entitle him to be relieved from the payment of the same and indemnified by the said bank from all liability respecting the said shares and removed from the list of contributories.

4. At the time the said shares, or a portion thereof, were purchased by the said Henderson the said bank was insolvent, and could not pay its

Statement. liabilities in full, and was on the eve of insolvency, as the said bank and its officers well knew.

5. At the respective times when the said shares, or a portion thereof, were transferred to [the said Henderson the shares so pretended to be transferred had no valid or legal existence.

6. If such shares, or a portion thereof, did exist the dealing with them by the said bank and its officers was illegal, and the holding and possession of them was illegal.

7. The shares, or a portion thereof, in respect of which it is sought to make the said Henderson liable as a contributory, are shares that were never actually issued; no money was paid on account thereof, and they were merely kept for the bank to speculate upon, and as such cannot be treated as shares duly issued by the bank, and in respect of which no liability can arise in favor of the bank as against the alleged holders thereof.

8. The said shares, or a portion thereof, were transferred to the said Henderson within a very short time before the winding-up order in respect of the said bank was made, and no opportunity was had by this contestant to commence proceedings to be relieved from any liability in respect of the said shares.

9. The necessary amount of capital stock of the said bank was not bona fide subscribed, nor bona fide paid up, to obtain a certificate to enable the said bank to commence and carry on the business of banking, and the necessary amount was not paid up within the time limited by the "Bank Act" to enable them to carry on the business of banking; or if such a certificate did issue it was on subscriptions and payments not bona fide made, and by reason of the circumstances aforesaid, and the "Bank Act" hereby pleaded, and the Act incorporating the same, the bank's charter became forfeited and void.

In support of this defence, by consent of all parties, an affidavit made by Almer Abbott Allen, late cashier of the said bank, was put in and read by the contestant instead of the evidence of the said Allen, which had been ordered to be taken under a commission. And that affidavit is as follows:

I, Almer Abbott Allen, of the city of Minneapolis, in the State of Minnesota, one of the United States of America, gentleman, make oath and say:

1. I was the cashier of the Central Bank of Canada from its formation until after its suspension, when Mr. Archibald Campbell was appointed interim liquidator by the Court.

2. J. D. Henderson, of Toronto, insurance agent, used the Central Bank of Canada from the time it commenced business as his bankers, and the business relations of the said bank with him were always pleasant and agreeable, and his account and credit with the said bank were always

in good condition, and by reason of our friendly business relations the *Statement* said bank, through me, requested him to purchase stock of the said bank for the bank to keep up its price when the market price of it was likely to fall.

3. Under a resolution of the provisional board of directors of the said bank, made on or about the the 10th day of January, 1884, there was transferred to me a large amount of stock of the said bank to hold for the said Bank, and afterwards I held the said stock, and dealt with the same for the said bank.

4. In the stock ledger of the said bank is an account headed in my name, in trust. The said account is really an account of the said bank shewing its dealings with and transfers of its own stock, all such dealings and transfers being carried on in my name in trust as therein set out, and all the advantages of such transfers and dealings the Central Bank of Canada were entitled to and got the benefit of, and all, or nearly all, of the directors of the said bank directed and supervised such dealings and transfers, and some of them were cognizant of the most of the same as they respectively took place.

5. On or about the 28th day of October, 1887, I saw Mr. J. D. Henderson, and on behalf of the said bank discussed with him the advisability of taking some means of keep up the price of the stock of the said bank by purchasing the shares thereof, and it was arranged between him and myself, acting on behalf of the said bank, that he should purchase fifty or more shares for the above purpose of keeping up the price of the said stock, and the bank was to furnish the necessary funds to do so, and to give the transactions the appearance of Mr. J. D. Henderson being the real purchaser it was arranged that he was to give his promissory notes for the amount of the purchase moneys of stock respectively, and give his cheque upon the Central Bank to his vendor of the shares purchased by him for the purchase money thereof, but it was understood that no liability should attach to him on the said notes, as they were merely given to make a colorable appearance of reality in the purchase of the said stock by the said Henderson, who in making the purchases thereof, and in all that was done in and about the same, and its completion, was acting for and on behalf of the said bank for its benefit and in its interest, as I and some of the directors thought, and by reason of what was done by him the price of the stock of the said bank was kept and maintained at a price much higher than it otherwise would likely have been rated at.

6. At the time the said Henderson was buying up Central Bank stock for the bank to keep up its price, D. Mitchell McDonald, one of the directors of the said bank, was also buying up stock of the said bank for the same purpose as the said Henderson was purchasing.

7. Under the arrangement between the said bank, through me, and J. D. Henderson, as aforesaid, and subsequent arrangements to the same effect made at later interviews between us, he purchased in all, I believe, about eighty-seven shares of the stock of the said bank within about a

Statement.

month prior to the suspension thereof, but before each purchase was made we had, I think, a consultation as to the advisability thereof.

8. Under the said arrangements J. D. Henderson gave promissory notes to the bank about as follows: One made by him on or about the 28th day of October, 1887, payable to himself and endorsed by him for \$4,800, to be paid in two months, and another for \$650, payable in one month, made to himself and endorsed by him. In another transaction the formalities of a note was not gone through with, and the bank paid \$2,700 for thirty shares purchased by the said Henderson and taken in his name for which he gave his cheque upon the said bank, and the bank paid the same, although he did not have sufficient funds to pay for the said shares himself, the reason being that the purchase money was really given to the vendor by the bank, who used Mr. J. D. Henderson and his name for the purpose of carrying out this transaction, as it did the prior and other transactions above referred to.

9. In all the said transactions in which the said J. D. Henderson purchased about eighty-seven shares of the capital stock of the said bank within about one month before its suspension, he had no beneficial interest either in the respective transactions themselves or the stock purchased by him, all of which was purchased by him for the said bank at my request, acting for the said bank, and duly authorized so to do by the directors thereof.

10. The said J. D. Henderson received no consideration for the promissory notes above referred to other than the said stock purchased by him for the said bank being in his name, all of which notes were given that might be said by the said bank that it was not purchasing its own stock and the said notes were taken for the various sums paid by the said bank for the stock purchased by the said Henderson for the said bank, and for no purposes or consideration other than those above mentioned.

The finding of the Master in Ordinary, in which I ordered the contestant to be placed on the list of contributors, is in these words:

I find that the admissions in the defence are sufficient to warrant finding that J. D. Henderson is a shareholder and therefore a contributor in respect of the shares set out on the list.

The grounds of appeal are set forth in ten different reasons why the finding of the Master in Ordinary should be set aside:

1. No evidence that the appellant was the holder of any of the shares.
2. That the transfers of shares to the appellant were made by A. L. who was at the time the cashier of the bank, and by various other persons.
3. That the bank dealt in the buying and selling of its own stock contrary to the provisions of the Bank Act.

4. That in pursuance of said illegal purpose the bank, through Allen its cashier, purported to transfer fifteen of said shares to appellant, who was in entire ignorance of the fact that he was being made use of for the illegal purpose aforesaid.

5. That the bank furnished the funds requisite to buy said shares, and the appellant, as a matter of form, gave his promissory note for the amount on the undertaking of the bank, that upon the next re-sale of said shares the said notes would be delivered up to be cancelled.

6. The said transactions were *ultra vires*, &c., and no shares passed, and appellant is not liable, &c.

7. As regards the 87 shares, if they were legally transferred to him, the appellant, they were so transferred within one month before the commencement of suspension of payment, and that under the Bank Act the person who was the holder thereof at the beginning of said month was alone liable to be settled upon the list of contributories, and that he as a subsequent holder should be treated only as an equitable owner, and that he should have the right to defend himself against any claim by his transferor.

8. The Master in Ordinary eliminates all intermediate parties between the first and last holders, and deprives the last of any defence he may have against his transferor, and in this case he has a good defence against any claim which his immediate transferor Allen or others, who transferred the stock to him.

9. No evidence was adduced to shew that the appellant was the holder of any stock.

10. In all the dealings with the said 87 shares the appellant acted as agent of the bank, and had no interest whatever in said shares, and the bank were the real owners of the same, &c.

The appeal came up for argument before Robertson, J., on December 16th, 1888.

A. C. Galt for the appellant. The transactions between the appellant and the bank were simply a trafficking by the bank in its own shares. The Bank Act, with Allen's affidavit, make a conclusive case in our favour, and no evidence is given in contradiction. We refer to *Bank of Toronto v. Perkins*, 8 S. C. R. 603; *La Banque Jacques Cartier v. La Banque D'Epargne*, 13 App. Cas. 111; *Trevor v. Whitworth*, 12 App. Cas. 409; *Chitty on Contracts*, (11th ed.), p. 611; *De Begnis v. Armistead*, 10 Bing. 107; *Sichell's Case*, L. R. 3 Ch. 119; *Bank of Hindustan v. Alison*, L. R. 6 C. P. 222; *The Central Bank, Baines's Case*, 16 O. R. 293.

Argument.

Meredith, Q.C., contra. Henderson was a party to a fraud upon the creditors and shareholders of the bank, and it does not lie in his mouth to plead the illegality of his his own transactions. He is in the position of a plaintiff applying to get rid of his liability: Buckley on Joint Stock Companies, (5th ed.), p. 39; *The Bank Act*, R. S. C. ch. 130, secs. 30, 38; Kerr on Fraud, (2nd ed.) p. 437; *Cree v. Somervail*, 4 App. Cas. 648; *Chapman and Barker's Case*, L. R. 3 Eq. 361; *Re Munster Bank and Dillon's Claim*, 17 L. R. Ir. 341; *Gardiner v. Victoria Estates Co.*, 12 Court of Sessions, p. 1356.

Galt in reply cited *Ex p. Watson*, 21 Q. B. D. 301; *Spackman v. Evans*, L. R. 3 H. L. 171; *Addison's Case*, L. R. 5 Ch. 294.

January 25th, 1889. ROBERTSON, J. :—

[After setting out the facts as above.] The amount involved in this case is of considerable importance, and the objections taken to the finding of the learned Master are numerous, and involve some very nice questions, all of which I shall consider, although in doing so I may be open to the charge of being somewhat prolix.

As to the first, no evidence, &c. I think the Master was right; the defence was in confession and avoidance, that is, it admitted that Mr. Henderson's name appeared, as charged, on the stock list or register or in the books of the bank as the holder of these shares, but he sets up matter which, if true and pleadable against the liquidators, is an avoidance of the contract, so that it was not necessary for the liquidators to go further than they did, viz., to produce the bank books shewing the fact of Mr. Henderson's name appearing therein as a shareholder for the several shares with which he is sought to be charged.

As to the second and third, they may be considered together with the fourth, fifth and sixth, and the whole set forth a fraudulent transaction, perpetrated in the face of the 45th section of the Bank Act, and the statement of

defence and the affidavit of Allen filed by Henderson by Judgment. and with the consent of the counsel for the liquidators, ROBERTSON, J. make out the facts alleged. But the question raised there-upon is: Can Mr. Henderson avail himself of this as a defence against the liquidators?

It must be borne in mind that this is not an action in which the bank as such is seeking to enforce payment of the amount due on shares subscribed for by Henderson, nor as to what the rights of shareholders of the bank are *inter se*, where the rights of creditors are not to be considered; on the contrary, the liquidators here represent creditors as well as the bank, and the rights of creditors having intervened the defence must be considered from that point of view only, and in my judgment it is not open to Mr. Henderson, on the facts made clear, as above stated, to set up the 45th section of the Act. Mr. Henderson is on the register as the person responsible for these shares, and it may be that he became such stockholder, expecting to be indemnified by the bank or its directors for anything that he might be called upon to pay, but that is a matter between him and them, and with which the creditors have nothing whatever to do. To outside creditors Mr. Henderson stands on the list just as any other person professing to hold shares, and creditors are not concerned to inquire into the rights existing between him and the directors or other shareholders.

A contract induced by fraud is not void but voidable, and, therefore, though the persons who by their fraud induced it may not enforce it, other persons may, in consequence of it, acquire interests and rights which they may enforce against the party who has been so induced to enter into it: *Oakes v. Turquand*, L. R. 2 H. of L. 325, afterwards followed in *Cree v. Somervail*, 4 App. Cas. 648. These cases were decided under the Limited Liability Act and the Imperial Winding-up Act, but are applicable in principle to the "Bank Act" of Canada and our "Winding-up Act." In my judgment, therefore, Mr. Henderson fails under the 2nd, 3rd, 4th, 5th and 6th objections, which refer

Judgment. more particularly to the 15 shares, for which he has been placed on the list of contributories, Class 1, Part 1.

ROBERTSON, J.

The objections 7 and 8 refer to the 87 shares, for which Mr. Henderson has been placed on the list Class 1, Part 2, he having acquired these shares and having become a shareholder after October 15th, 1887, and who was such shareholder at the date of the winding-up order. The 77th section of "The Bank Act" treats of "persons who having been shareholders" who have transferred their stock within one month before the commencement of the suspension of payment, and declares that they "shall be liable to all calls on such shares as if they had not transferred them, saving their recourse against those to whom they were transferred." And sec. 45 of the Winding-up Act, R. S. C. c. 129, declares that "if a shareholder has transferred his shares under circumstances which do not, by law, free him from liability in respect thereof, or if he is by law liable to the company or its members or creditors, as the case may be, to an amount beyond the amount unpaid on his shares, he shall be deemed a member of the company for the purposes of this Act, and shall be liable to contribute as aforesaid to the extent of his liabilities to the company or its members or creditors independently of this Act; and the amount which he is so liable to contribute shall be deemed an asset and a debt, as aforesaid."

On referring to the list of contributories brought in by the liquidators, which was put in on the argument of this appeal, it appears that the 87 shares for which the appellant has been placed on the list by the Master in Ordinary, Class 1, part 2, were derived from different persons on different days, viz.: 30 on October 26th, 20 on October 29th, 7 on November 1st, and 30 on November 15th, and his several transferors also became holders thereof "within one month before the commencement of the suspension of payment by the bank." And the Master in Ordinary has not placed these transferors on the list of contributories, but has made a special report in regard to them, in which he held that they were not shareholders or members of the

bank within the terms of the statutes and winding-up orders, concluding, as I understand, that the 77th section of the Bank Act did not apply to them, the words "persons who having been shareholders" meaning persons who had been shareholders for more than "one month before the commencement of the suspension," &c., and who continued to be such at the time of the suspension, &c.

I confess that I cannot agree in this opinion. I think the true meaning of the statute is so plain that it cannot be construed otherwise than to mean "all persons who may be, or may have been, shareholders within one month before the suspension," &c. Suppose a case, which may really be one of those on the list brought in by the liquidators. A. was the owner on October 1st of 10 shares, but on October 26th he sold and transferred to B., whose name was entered on the register. B. was then doubtless a shareholder, but on the 27th B. transferred to C. According to the Master's ruling B. would not be liable, but A. and C. both would, C. principally and A. secondarily. With all respect for the opinion of the learned Master, I do not think that the statute will bear, or was intended to bear, such construction. In *C. C. Baines' Case*, lately disposed of by the Chancellor, 16 O. R. 293. the question was whether Baines should be on the list, he having acquired his shares within the month, and he appealed, contending that sec. 77 meant that he having become a shareholder within the month his name should have been omitted from the list of contributories, and his assignor's name placed there instead. The Chancellor held that his name was properly on the list, and dismissed the appeal. Now the facts of this case are on a par with that now under consideration before me. Baines received his shares on November 1st, the bank having suspended, or rather passed a resolution to suspend, after 3 o'clock p.m. on that day. Mr. Henderson received his 87 shares between October 25th and 3 o'clock of November 15th, so that he is properly on the list, but I think Mr. Henderson is right in his contention, that those from

Judgment.
ROBERTSON, J.

Judgment. whom he received them should also be there as parties contributories secondarily liable. It may be argued, however, that this would not affect the liability of Mr. Henderson. But I am not sufficiently clear to be in accord with that contention. Questions may arise between the transferor and transferee as to the validity of the contract and it might be prejudicial to the transferee if he allowed the finding of the Master to go unimpeached, as to which, however, I pass no opinion; but it is clearly in the interests of the creditors of the bank that all persons liable as shareholders should be on the list of contributories, and although the liquidators have acquiesced in the report of the Master, it must be borne in mind that they are the officers of the Court, and when the matter is brought to the notice of the Court, as it has been by this appeal, I think it the duty of the Court to protect the interests of the creditors and all parties concerned, and to see that all are charged who are legally chargeable, and being of opinion that all persons who were stockholders within the month next before suspension, no matter for how long time, are either primarily or secondarily liable, the names should be placed on the list of contributories. I therefore, for that purpose, refer the report back to the Master in Ordinary, with directions to bring those persons referred to before him, with the view of having the respective names placed on the list of contributories. On the list prepared and brought in by the liquidators the claimant claimed that all such persons as above referred to should be so treated, but the learned Master having decided against them they unfortunately, I think, submitted.

As to objections 9 and 10, the same reasons for disallowing the 1st, 2nd, 3rd, 4th, 5th, and 6th objections apply to these, and I therefore am obliged to disallow them. I think the Master was right in placing Mr. Henderson's name on the list for these 87 shares. I can see no escape for him as against the liquidators. It will not avail him to set up that the transaction is void as between him and the bank. If this was a suit to enforce payment of

calls by the bank, and not by the liquidators, I am not ^{Judgment.} going to say whether he would or would not have a good ^{ROBERTSON, J.} defence. But in this case the liquidators represent the creditors as well as the bank, and Mr. Henderson, according to his own shewing and the affidavit of Allen filed by him, establishes that there was something very much like a conspiracy concocted between him and Allen to keep the standing of the bank up in the estimation of the public, and that at a time when Mr. Henderson should have known, if he did not, that it was not in a safe condition. The object had in view by both of them was to make the public believe that the stock of the bank stood well on the market, thereby inducing innocent persons to become shareholders. It is most probable that the whole of these transactions were miserable shams, so far as Mr. Henderson was concerned. It may be that he had no intention of remaining a stockholder longer than the time necessary to dispose of the stock to some other purchaser, but as is said by Allen in his affidavit, being on "friendly business relations" with the directors and Allen, he lent himself to their nefarious schemes to place the stock at a fictitious value "to keep up its price when the market price was likely to fall," and he must now thank whatever motive he had at the time for landing him where he now finds himself. He has not come into Court with clean hands. He cannot be permitted, against those creditors who have been great sufferers by such transactions, to take advantages of a wrong to which he himself was and is admitted to be a party. I have on a former occasion animadverted to some extent on "the devious paths where wanton fancy leads," and which were followed apparently by those who had the management of this unfortunate institution, and whose transactions have led to great loss, much misery, and perhaps ruin, and I cannot help expressing my regret that Mr. Henderson did not see the dishonesty of the proposition which Allen made to him, and did not treat it accordingly. He is, I think, now both in law and equity bound to perform the contract he entered

Judgment. into when he accepted these shares, and I therefore dis-
ROBERTSON, J. miss his appeal so far as that question is raised. But
 think, as he has partially succeeded, he should not be
 called upon to pay costs. The costs of the liquidator
 will, however, have to be paid out of the assets.

A. H. F. L.

[CHANCERY DIVISION.]

RE CENTRAL BANK.

CAYLEY'S CASE.

*Company—Bank—Winding up—Proof of claim—Cheque accepted by bank
 after suspension—Set off—Subsequently accruing liability of drawer
 cheque—Fraudulent preference—R. S. C. c. 129—Creditor proving claim
 after time—Ex debito iustitiæ.*

On November 15th, 1887, the day before the suspension of the Central Bank, one D., having sufficient funds to his credit, drew a cheque upon it payable to C., who deposited the same in the Dominion Bank, and obtained an advance upon it, and the Dominion Bank claimed upon it in the winding up proceedings, having presented it for payment on November 17th, when, however, the Central Bank had suspended payment. On November 23rd, 1887, the Central Bank marked the cheque good, debiting D.'s account and crediting the Dominion Bank with the amount thereof. Afterwards, however, the liquidators claiming the right to set off certain subsequently accruing liabilities of D. against the cheque, the Dominion Bank withdrew their claim upon it, and the Master in Ordinary disallowed it. Subsequently, and after the first dividend had been paid, C. heard of this, and filed a claim on the cheque, on September 13th, 1887. The Master, however, held that the time for filing claims having elapsed, he had a discretion as to allowing the claim, and allowed it only subject to the said set off.

Held, that there was no right to set-off as claimed, and that the allowance of the claim was *ex debito iustitiæ*, and not discretionary.

The fact of the Central Bank having accepted the cheque, and credited the amount to the Dominion Bank, and charged the amount to Donovan, shewed conclusively that at that time the Central Bank was not a creditor of Donovan: nor did the case come within the meaning of any of the clauses in the Winding up Act relating to fraudulent preferences.

THIS was an appeal from the report of the Master in Ordinary in the winding-up proceedings of the Central Bank.

Bank, made on November 1st, 1888, whereby he allowed ^{Statement.} the liquidators to set off the sum of \$934.34, against the claim of one Frank Cayley of \$3,440, under the circumstances fully set out in the judgment of Robertson, J. Among other general grounds set out in the notice of appeal were the grounds "that the liquidators had allowed the said claim in the books of the bank with full notice and knowledge that the same was just and reasonable, and that the set off claimed by them was not chargeable against the said claim, and that the books of the said bank were altered by the liquidators illegally and in bad faith."

The Master in Ordinary gave the following reasons for his decision :

This creditor comes in after the time limited by public advertisement, and asks to prove his claim, and be allowed the past and future dividends on such claim out of the estate of the bank.

His claim is on a cheque of J. A. Donovan for \$3,440 on the Central Bank in favor of the claimant which was accepted by the bank on November 23rd last and credited to the Dominion Bank to "suspense account" on the same day.

Subsequently the Dominion Bank brought in a claim for the amount of this cheque, and others, but on the objection of the liquidators that they claimed a set off against Donovan for unpaid notes the Dominion Bank, which appears to have acted in the matter as the agent of the present claimant, withdrew the claim.

Save making the cheque payable to the order of the claimant, and the following letter addressed to the cashier of the bank the Central Bank had no notice of the present claimant's title.

TORONTO, Nov. 22nd, 1887.

DEAR SIR.—I have given to Mr. Frank Cayley a cheque on the Central Bank for \$3,440. He has deposited it to his credit at the Dominion Bank I request therefore that that amount may be transferred from my account and placed to the credit of the Dominion Bank.

Your obedient servant,

JOSEPH A. DONOVAN.

On the following day Mr. Donovan gave the following letter of guarantee to the claimant :

TORONTO, Nov. 23rd, 1887.

DEAR SIR,—I undertake to hold you harmless against any loss which may in any way arise from your having endorsed my cheque for \$3,440 on Central Bank in the matter of the sale from John T. Taylor to T. B. Hagen.

Yours &c.,

JOSEPH A. DONOVAN.

Statement.

The first of the above letters requests the amount of this cheque to be transferred from Mr. Donovan's account to that of the Dominion Bank, and except for the reference to the fact that the cheque had been drawn in favor of the claimant the liquidators apparently had no notice of the claim.

Subsequently and some months after the withdrawal of the claim from the Dominion Bank, the liquidators adjusted the account of Donovan with the Bank, charging against it certain overdue notes, but I stated that I could not hold their act to be binding on Donovan or the claimant, no notice of such adjustment having been proved by the liquidators.

The rule as to allowing the creditors to come in and prove their claims after the expiration of the published time gives a discretion to the Court as to imposing terms and conditions as to costs and otherwise.

In some cases leave has been refused, as in *Cattell v. Simons*, 8 B. & S. 243. In other cases the creditor has only been allowed part of his claim, as in *Gillespie v. Alexander*, 3 Russ. 130, and in doing so the Court has given consideration that the burden lay on the creditor as well as on the parties who were liable, to collect the balance of his claim from those who had been overpaid.

And in another case when the creditor has two funds to claim against, the rule of bankruptcy was applied, and he was only allowed to prove for the balance after realizing as much as he could out of the funds the creditors had no claim against, *Greenwood v. Taylor*, 1 R. & M. 101.

In this case the burden is as much on the claimant as on the liquidators to collect some of this claim from Donovan. This claimant has a letter of guarantee from Donovan to hold him harmless against any loss should he be unable to collect the full amount from the Central Bank, and in allowing him to come in now and prove his claim I think I should not cast the burden of collecting money on the liquidators which may as well be cast by this claimant. I therefore give the creditor leave to come in and prove for the balance due Donovan after satisfying the claims of the Bank for the unpaid notes, and I direct the liquidators to assign to the claimant the unpaid notes, so that under his letter of guarantee and the notes he may have a double claim against his debtor.

The appeal came on for argument on December 18, 1888, before ROBERTSON, J.

Beck, for the plaintiff. Under the Winding-up Act a creditor can come in at any time before the distribution of the assets, and it was not a matter of discretion on the Master's part to let him come in. The cheque was a marked cheque, and Donovan had been debited by the Bank, and the liquidators had no jurisdiction to alter the account. I refer to *Lascelles v. Hogg*, 11 Ves. 602; *Ashley v. Ashley*, 1 Ch. D. 24; *Ch. D. 757*; *Re Metcalfe*, *Hicks v. May*, 13 Ch. D. 2.

Angell v. Haddon, 1 Mad. 529; *David v. Frowd*, 1 M. & Argument. K. 200; *Greig v. Somerville*, 1 R. & M. 338; *Todd v. Studholme*, 3 K. & J. 324; *Williamson v. Naylor*, 3 Y. & C. 208; *Wild v. Banning*, 2 Eq. 577; *Cattell v. Simons*, 8 Bea. 243; *Brett v. Carmichael*, 35 Bea. 340; R. S. C. ch. 129, secs. 56, 57, 58, 59, 60, 67.

W. R. Meredith, Q.C., for the liquidators. The claimant must submit to have set-off the notes due by Donovan. A cheque is not an assignment of money in the hands of the banker, but a bill of exchange drawn on the bank; *Hopkinson v. Foster*, L. R. 19 Eq. 74. The appellant relies on the acceptance of the cheque by the bank on November 23rd, but this was within three months of the winding-up, and is bad as a fraud against creditors: Sec. 68 of the Winding-up Act, R. S. C. ch. 129. Cayley must have known that the bank could not pay its debts. I rely also upon sec. 57, as to set-off; and on sec. 73, as shewing that what Donovan was doing was not intended by the Legislature to be permitted. Sec. 72 would make void this transaction even if the cheque had been paid. The following authorities may be referred to: *Ex parte Wagstaff*, 13 Ves. 65; *Atkinson v. Elliott*, 7 T. R. 378; *Ex parte Prescott*, 1 Atk. 230; *Dobson v. Lockhart*, 5 T. R. 133; *Alsager v. Currie*, 12 M. & W. 751; *Sheldon v. Rothschild*, 8 Taunt. 156, Sec. 56 shews the policy of the Act. As to *Re Milan Tramways Co.*, *Ex parte Theys*, 25 Ch. D. 587, see, Lord Selborne at p. 591. The appellant cannot rank for any more than Donovan could have ranked for. Donovan kept his own account at the bank, could he have gone there himself on the 23rd and drawn out the money?

Beck, in reply. The bank must be taken to have had notice of Cayley's claim. Cayley on the other hand had no notice of the insolvency of the bank, and did not come within the provisions as to preferences.

January 25th, 1889. ROBERTSON, J.:—

This is an appeal against the order of the Master in Ordinary allowing the liquidators to set off against the

Judgment. appellant's claim of \$3,440 the sum of \$934.34, being the amount of the indebtedness of Donovan to the bank accrued since the date of the winding-up order. The facts are as follows:

ROBERTSON, J. On November 15th, 1887, one Donovan gave a cheque on the Central Bank, payable to Mr. Cayley or order, for \$3,440, at which time there was to the credit of the drawer, a sum more than sufficient to pay the cheque. The cheque was given in part payment of the purchase money of real estate, which Cayley had sold as agent of the proprietor, to Donovan. The cheque was endorsed by Cayley and presented for payment on the day after date, viz., November 16th, on which day the Bank suspended payment. Cayley deposited the cheque in the Dominion Bank, on the faith of which that bank advanced Cayley \$3,000, with which he paid his principal amount due to him out of the purchase. The Dominion Bank was to look after payment from the Central Bank, and after it was found that the Central Bank could not pay on, and was put in liquidation, the Dominion Bank included this cheque with other claims, which it held against the Central Bank in answer to the advertisement calling upon creditors to file their claims, &c. But long before this was done, and long before the winding-up order was issued, the Central Bank honoured the cheque by accepting it on the November 23rd, and charged it against Mr. Donovan's account leaving a balance in favour of something over \$30, and at the same time gave credit to the Dominion Bank for the amount. The claim of the Dominion Bank was filed within the time required by the Master in his order directing claims to be filed. By this time Donovan became indebted to the Central Bank on some promissory notes, held by it under discount, and the liquidators objected to allow this item of \$3,440, in the Dominion Bank claim, without parley the item was withdrawn by the Dominion Bank with others objected to, and the claim as allowed by the liquidators was allowed to stand. Cayley ne

received any notice of this disallowance, and he was resting in ignorance of it, until after the first dividend was closed and made payable. Upon being informed how matters stood he, on September 13th, 1888, filed his claim against the bank on the cheque. The liquidators then claimed to set off against it, the amount which in the meantime Donovan had become indebted to the Central Bank. After hearing all the evidence pro and con the Master in Ordinary allowed the claim less the sum of \$934.34, as above stated. In my opinion the Master in Ordinary came to a wrong conclusion. There is no doubt that had the cheque been presented on the day of its date, it would have been paid, and for weeks after the amount of it and more was to the credit of the drawer, and the fact of the bank not only having accepted it, but marked it cancelled and charged the amount to the drawer and credited the Dominion Bank with it, shews conclusively that at that time the Central Bank was not a creditor of Donovan's. I think the case of *Re Milan Tramways Co., Ex parte Theys*, 25 Ch. D. 587, is authority directly in point, and the words of Lord Selborne, L. C., in the first part of his judgment, that to hold otherwise, "may be law, but if so it is only matter of positive law, not resting upon any principle of justice." And his Lordship, as well as the other Lord Justices afterwards hold that it is not law, and therefore it is neither according to law, or the first principles of justice, in my judgment to hold that Mr. Cayley is not entitled to rank for the full amount of his claim.

Mr. Meredith very ably argued, that as the bank was insolvent at the time the cheque was accepted and the amount charged to Mr. Donovan and credited to the Dominion Bank, the liquidators under the clauses of the "Winding-up Act" against fraudulent preferences could recover the amount back had it been paid on the day it was accepted, but I cannot subscribe to his contention. If that was the case, every depositor who had money in the bank, subject to call, would be liable to be called upon to

Judgment.
ROBERTSON, J.

Judgment. pay back his own money to the liquidators, which he has
ROBERTSON, J. within thirty days, next before the winding-up order was
made, withdrawn from the bank. Here the money to the credit of Donovan, was his money; he could have drawn all out on the day on which he gave the cheque to Cayley, and he only became a debtor sometime afterwards, on notes which were current at the time. The bank certainly would have no right to hold this money until these notes matured. The liquidators have their remedy against Donovan on these notes, and to him they must look for payment, and not to the innocent holder of a cheque, which in the ordinary dealings of merchants, with banks, is looked upon and recognized as so much money, after it is once honoured by the bank on which it is drawn.

It was also urged that it was a matter of discretion on the part of the Master in Ordinary, to allow Mr Cayley to make his claim after the time fixed by his order for filing such. If it was a matter of discretion, which I do not think it was, in my judgment, the Master would have been exercising it against all precedent had he not allowed the claim.

I must therefore allow the appeal, with costs, to be paid out of the assets of the Bank. And I direct that the order of the learned Master be varied to that effect, and that the liquidators do forthwith pay to the said Frank Cayley, out of the assets of the said bank, all such sums as he may be now entitled to as settled by this appeal, and from time to time thereafter, as they accrue, such sums as he may hereafter be entitled to in respect to other dividends on the footing established by this judgment.

A. H. F. I.

[CHANCERY DIVISION.]

NELLES V. THE ONTARIO INVESTMENT ASSOCIATION.

Company — Shareholder — Misrepresentation — Rescission of contract for shares.

In an action by a shareholder of an investment association to have it declared that his subscription for shares had been obtained by fraud and misrepresentation, and that it was not binding upon him, and for other relief, it appeared that in 1882 the said association had amalgamated with a loan society, and under the terms of the amalgamation the shareholders in the latter became entitled, on payment of a premium of 17 per cent., to an equivalent number of shares of the former.

It was thus the plaintiff became entitled to his shares in the association, having previously been a shareholder in, and manager of, the loan society; and he was an assenting party to the amalgamation, which he now attacked as *ultra vires*, and brought about by misrepresentation and fraud. But it was proved that there were many material misrepresentations, falsely and fraudulently made, in a certain report of the association, dated December 31st, 1888, which had been an important factor in bringing about the assent to the amalgamation by the society, and in inducing the plaintiff to subscribe for the shares in the association, and that the plaintiff had not become aware of their falsity until shortly before bringing this action. After the amalgamation the association borrowed large sums of money upon debentures, etc., on the faith of the apparently existing state of affairs, but it was not shown that the association was insolvent, or on the eve of insolvency.

Held, that the plaintiff was entitled to a rescission of the contract made by his subscription for stock in the association.

Held, also, that the fact of the plaintiff having sold some of his shares would not prevent rescission as to the remainder of them.

THIS was an action brought by the plaintiff for the purpose of having it declared that his subscription to shares in the Ontario Investment Association, was obtained by fraud, misrepresentation, and concealment, and that the same was not binding upon him, and for other relief under the circumstances which are set out in the judgment. The defendants were the said Association and the Superior Loan and Savings Society. Statement.

The action came on for trial at London before Ferguson, J., on October 10th, 1888.

E. Blake, Q. C., Cassels, Q. C., and Gibbons for the plaintiff (a). If the plaintiff's agreement to take shares was

(a) The argument which was of great length is only reported on the points on which the decision turned.—*R.E.P.*

Argument.

wholly void, then there was no agreement. Was the plaintiff's agreement to take shares such that at any time he could have avoided it? He had no knowledge of anything but what was in the report of December 31st, 1881. This it was on which he relied. Now if any one of the inducements was fraudulent, that will vitiate the contract to take shares. Here, to say the least, the main inducement was fraudulent. The basis of the market price of the shares was the "rest." This does not actually control the price but it is the basis of it. A fictitious market price was created. A prudent man would naturally look to the substructure which would be the "rest." The statements in the report were framed with the express object of creating a false and sham condition of things to be represented to the public. Loans which were loans on the company's own stock, are represented as not being upon the company's own stock. The most material fact that they were loans upon the company's own stock was concealed and misstated and fraudulently so, and moreover such loans were illegal. If the fact had been stated that there were loans on their own stock of over \$200,000, what an immense field of investigation would have been opened up. The statements as to the "rest" were fraudulent and untrue. So with the other statements in the report. The investor was led away by misstatements, concealment, and fraud. This is shewn beyond a doubt, and the temporary success of a fraud is no reason why it should not be denounced or why it should be condoned. The plaintiff declares that he did not know or suspect anything till the latter part of 1887. There is no creditor intervening in this case, and no liquidator representing creditors. The effort in taking the evidence seemed to be to bring the case under *Tennent v. City of Glasgow Bank*, 4 App. Cas. 615, but the cases are not alike. As laches, fraud being established it is for the party alleging laches to shew when the party defrauded acquired knowledge of the truth: *Lindsay Petroleum Co. v. Hurd*, L. R. P. C. 221. The facts here are such as would have supported

an action for deceit, but less is required for rescission: *Argument.*
Clough v. London and North-Western R. W. Co., L. R. 7, Ex. 34; *Petrie v. Guelph Lumber Co.*, 2 O. R. 218; *Lindsay Petroleum Co. v. Hurd*, L. R. 5 P. C. 221, at p. 241; *Smith's Case*, L. R. 2 Ch. 604; *Redgrave v. Hurd*, 20 Ch. D. 1; *Edgington v. Fitzmaurice*, 29 Ch. D. at p. 483; *Peek v. Derry*, 37 Ch. D. 541; *Re Scottish Petroleum Co.*, 23 Ch. 413; *Tenment v. City of Glasgow Bank*, 4 App. Cas. 615; *Western Bank of Scotland v. Addie*, L. R. 1 Sc. Ap. 145; *New Brunswick and Canada R. W. and Land Co. v. Conybeare*, 9 H. L. Cas. 711; *Maturin v. Tradennick*, 12 W. R. 740; *Ex parte West*, 56 L. T. 622; *Stace and Worth's Case*, L. R. 4 Ch. 682.

Oslar, Q. C., Moss, Q. C., T. G. Meredith, and Frazer, for the defendants. If the plaintiff succeeds, and the amalgamation is declared void, the validity of the stock amounting to \$750,000. would, to say the least, be threatened. The result would be the withdrawal of the \$750,000 from contribution, and the insolvency of the Society. Next there will be a suit for declaring the amalgamation with the Equitable void also. This is really an effort after having been in partnership five or six years to take the assets away from the creditors and to get back something. We say this should not be allowed, but the assets should first go to pay the creditors, and then back to the shareholders. No doubt things were done by the executive officers which should not have been done; but there was no auditing and examining of the assets on either side, no inspection, no valuation made. The ordinary business enquiries were not made on either side. The plaintiff himself was perfectly satisfied, and urged the amalgamation on the other stockholders before he could have seen the report of December 31st. How could he have been induced to enter into the agreement by that report? The Ontario Investment Association was perfectly solvent, and could have paid all if wound up on the date of the amalgamation. But assuming that a rescission might originally have been had by the plaintiff, it is too late now. The plaintiff

Argument.

wants to draw a hard and fast line on this point at liquidation; but this is unsustainable: R. S. O. ch. 150 secs. 2, sub-sec. 6, 40, 53; *Re Bank of Hindustan, China, and Japan, Alison's Case*, L. R. 9 Ch. 1. The plaintiff's success here would take away the remedy of the creditors against him. The superseding equities that have arisen, permit no rescission. *Alabaster's Case*, L. R. 7 Eq. 273, is of no avail here. Much has intervened here which would render rescission improper and on this part of the case we cite: *Cocker's Case*, 3 Ch. D. 1; *Tennent v. City of Glasgow Bank*, 4 App. Cas. 615; *Oakes v. Turquand*, L. R. 2 H. L. at pp. 348, 350, 351, 357, 363, 364. The position of the creditors and the condition in which the company is must be a matter of consideration in every case of rescission. In *re London and Leeds Bank, ex parte Carling*, 56 L.J. Ch. 321; *Adam v. Newbiggin*, 13 App. Cas. 308; *Western Bank of Scotland v. Addie*, L. R. 1 Sc. App. 145; *Fraser v. MacLean*, 46 U. C. R. 302; *Urquhart v. Macpherson*, 3 App. Cas. 831. Amongst other things, bonds and debentures were issued on the faith of the new subscriptions; and credit was got on the faith of them. There have been radical changes as prevented rescission in the *Addie Case* *supra*, and see *Long v. Guelph Lumber Co.*, 31 C. P. 12. Again if the plaintiff read the report of December 31st, he also read the subsequent ones and knew that there were errors: *Scholey v. Central R. W. Co. of Venezuela*, footnote to *Ashley's Case*, L. R. 9 Eq. at p. 266. The plaintiff is chargeable with notice under this case. It was his duty to make enquiry: *Ashley's Case* L. R. 9 Eq. 26. And see *Tuite's Case*, L. R. 3 Eq. 795; *Erlanger v. New Sombriero Phosphate Co.*, 3 App. Cas. 1218. The plaintiff asks that a transaction may be set aside affecting a large number of people who are not parties here, and when both companies are on the record affirming the transaction. *Morrison v. Earles*, 5 O.R. 344; *Beatty v. Neelon*, 12 A.R. 3. The Court should not favour the plaintiff's endeavour to separate himself from the mass of shareholders whose rights depend upon the validity of the amalgamation. The plaintiff

tiff should be held to the position of all those who were sharers with him in the transaction. He took part in and assented to the whole thing, sold stock and received profits, and remained six years without complaint, and cannot now complain. Even if the statutes were private Acts the plaintiff was bound to know the law and the legal position of affairs. *The Bank of Hindustan Case*, L. R. 9 Ch. 1, shews this. He must also be assumed to have read the subsequent reports: per Lord Cairns, L. C. in *Scholey's Case*, in the note to *Ashley's Case*, L. R. 9 Eq. at p. 266. He must have seen that the statements in the report of December 31st were not accurate, and with this knowledge he allowed these statements to be used by the company to obtain large credit: *Gregory v. Patchett*, 33 Bea. 595; *Erlanger v. New Sombrero Phosphate Co.*, 3 App. Cas. 1218; *Central R. W. Co. of Venezuela v. Kisch*, L. R. 2 H. L. 99. As to the misrepresentations inducing the arrangement that was come to, all the shareholders came in as a body, and did the act, and one cannot now withdraw unless all do so: *Re Empire Assurance Corporation, Challis's Case*, L. R. 6 Ch. 266; *Hull Flax and Cotton Mill Co. v. Wellesley*, 6 H. & N. 38. The finding on the evidence should be that the plaintiff had determined to become a shareholder before the report of December 31st, and that he was not influenced by it. The circular signed by him, if nothing else, shews this beyond all reasonable cavil. Then there is the delay and acquiescence after August 3rd, 1887. The discovery of further fraud does not engender the right to revive a fraud that has been waived: *Kerr on Frauds*, 2nd ed., p. 382; *Campbell v. Fleming*, 1 Ad. & E. 40; *Thompson v. Canada Fire and Marine Ins. Co.*, 6 O. R. 291.

Blake, in reply. As to the circular, the plaintiff did not sign it personally, but only countersigned as secretary of the company that which was signed by the president. After the vote at the meeting of the 24th, it remained for each individual shareholder to assent or not. The plaintiff might have rejected the position. He did not subscribe till October: then he did the final act of signing, and he

Argument.

proves that he did this on the faith of the report. It is not necessary that the representation should have been the sole inducement: *Kerr on Frauds*, 2nd ed., p. 35. The man who made the representation must prove that it was not relied on. There is no logic in the argument as to the subsequent reports. Error in one does not argue the same in the other. As to creditors, there is no case where their interests were taken into account when they were not before the Court: *McCracken v. McIntyre*, 1 S. C. R. 479. When liquidation is commenced, the creditors are represented and it is then too late to rescind. There has been no such delay here as to bar relief. No equities have intervened to interfere with the right of rescission. What has been shewn is, that the plaintiff was free to subscribe or not up to the time he did subscribe; that if he had not done so he would have been entitled to his share of the Superior assets; that he subscribed on the faith of the report and representations; that he did not know of these till shortly before he brought this suit; and that some of these representations were falsely and fraudulently made, and many of them wholly untrue.

January 18th, 1889. FERGUSON, J.:—

The plaintiff alleges that on or about the 22nd day of March, 1882, he was a subscriber for 101 shares of the capital stock of the Superior Loan and Savings Society, and that that number of shares had been allotted to him by the Society: that about the same date an alleged amalgamation was brought about between the defendants, by which it was agreed that they should be amalgamated, and the plaintiff should receive in lieu of his shares in the Superior Society a like number of shares in the Ontario Investment Association upon paying an additional premium of 17 per cent., and the plaintiff was induced to subscribe to the books of the Association for 101 shares of stock in the association, and to pay such additional premium: that the amalgamation was and is wholly *ultra vires*, the Association having been

incorporated under the provisions of "The Ontario Joint ^{Judgment.} Stock Companies Letters Patent Act," R. S. O. ch. 150, ^{FERGUSON, J.} and having no power or authority under the letters patent or otherwise to amalgamate with the Society, which was a Society organized under the provisions of the Act relating to Building Societies, R. S. O. ch. 169: that the Association did not, nor could not, allot the said stock to the plaintiff nor give him any title thereto by reason of such alleged amalgamation being *ultra vires* and void: that in pursuance of such alleged amalgamation the Society transferred all their assets to the Association: that the alleged amalgamation and the consent of the plaintiff thereto, and his subscription to such stock-book of the Association were brought about and obtained by the fraudulent misrepresentations of the Association and their concealment of facts material to be known: that the Association are threatening to bring an action against the plaintiff to compel payment of the full amount of such alleged subscription of stock: and that the plaintiff promptly repudiated such subscription of stock as soon as he discovered such fraudulent misrepresentation and concealment.

The plaintiff says that he seeks to have the said alleged amalgamation, and all that was done thereunder, including his the plaintiff's subscription for such stock in the Association, declared to be *ultra vires*, null and void, or to have it declared that the alleged amalgamation is null and void by reason of such fraudulent misrepresentation and concealment, and to have all necessary accounts taken as between the defendants of the dealings of the Association with the assets of the Society which were transferred to them, and to have the Association pay over all moneys received in respect of securities transferred in pursuance of the alleged amalgamation re-transferred, and the Society placed as far as possible in the same position as it would have been in but for such illegal transfer, and alleged amalgamation.

Or to have it declared that the plaintiffs' subscription was obtained by fraud, misrepresentation, and concealment, and that the same is not binding upon the plaintiff.

Judgment. The plaintiff also asks for his costs of suit.

FERGUSON, J. The Association in their defence say that the plaintiff was a shareholder in the Society, and the holder of 25 unpaid shares in the capital stock thereof; that at the time of the transactions between the Association and the Society, the plaintiff was secretary-trésurer of the Society and joined in and was a party to the entering into and carrying out of the said transactions: that about the first day of February, 1882, negotiations were entered into between the Association and the Society, having for their object the transfer of the assets of the Society to the Association, and the shareholders in the Society becoming shareholders in the Association: that these negotiations resulted shortly after in an agreement being come to between the Association and the Society in which all the shareholders in the Society acquiesced, by which it was agreed that upon completion of the payment of a further premium of seventeen per cent. upon the subscribed capital of the Society which was to be provided by the shareholders of the Society, the Society should transfer to the Association all its assets, and the Association should issue and allot to the shareholders of the Society shares at par in the Association to an amount equal to the stock in the Society which such shareholders then had, and that it was further agreed that the Association should advance to the shareholders of the Society at six per cent. per annum, half yearly, for a term of two years on the security of the shares held by them, the money required to pay the premium of seventeen per cent.: that in pursuance of this agreement the Society transferred its assets to the Association, and the Association assumed and paid off the liabilities of the Society: that this premium of seventeen per cent. was provided by the shareholders of the Society, part of it being paid in cash, but the greater part of it being advanced by the Association in accordance with the terms of the agreement: that thereupon the Association issued to each of the shareholders of the Society, in lieu of his shares therein an equal amount in the Association, and that each of suc

shareholders subscribed for such shares upon the books of the Association: that the plaintiff subscribed the stock of the Association for 251 shares of the capital stock thereof, upon which nothing had been paid, and agreed to pay the calls thereon as the same might be made in due course of law. They deny that the Society was induced to enter into the transaction, or that the plaintiff was induced to do so or to subscribe for the stock by the fraudulent misrepresentation or concealment as alleged, and say that after the plaintiff's subscription for the shares in the Association he sold and transferred to various persons 150 of them, and that some of these persons have transferred the shares so transferred to them, so that the same cannot now be traced or identified, and that the plaintiff made a profit on the shares so sold and transferred by him: that long after the completion of the transactions the plaintiff borrowed from the Association on the security of 101 of the shares \$858.50, and on March 24th, 1884, he assigned these shares to the London Stock Debenture and Investment Company to secure a loan of \$954.09, which he agreed to pay on demand, with interest at the rate of 7 per cent. per annum payable half yearly, no part of which, or of the interest on which, he has since paid, and the said shares are still held by the said company as security for the said loan: that all of the said 150 shares so sold and transferred by the plaintiff passed into the hands of persons who hold the same under such circumstances that they cannot repudiate them: that the Society has always acquiesced and now acquiesces in the transaction, and admits the validity thereof: that many of the shareholders who were shareholders in the Society and became shareholders in the Association have sold and transferred the shares acquired by them in the Association and are not now shareholders therein; but the shares held by them are now held by purchasers, who have bought the same as valid shares: that almost all of the assets of the society which were transferred by it to the Association have been disposed of, and the Association has ever since the said transactions

Judgment. took place continued to carry on its business with the
FERGUSON, J. assets acquired by means thereof, and has accepted and
 treated and represented the plaintiff and the other persons
 who became shareholders in the Association as shareholders
 therein, and they have taken part in the management of
 the business of the Association, and voted at the annual
 and other meetings of the Association in respect of the said
 shares: that since the transactions took place the Association
 has borrowed from various persons residing in Great Britain,
 and elsewhere, large sums of money amounting in the
 whole to several millions of dollars on its credit, and on the
 faith of the assets of the Society having passed to the
 Association, and of the plaintiff and the said other
 persons having become shareholders in the Association,
 and liable to pay the calls upon the shares subscribed
 by them, all of which was well known to the plaintiff,
 and that the Association is still indebted on account of
 the said borrowing in upwards of one million of dollars.
 They set up that the plaintiff has by these and his other
 acts and conduct acquiesced in and taken the benefit of
 the said transactions being effectual for the purposes
 intended, and that he cannot now impeach the same as
 not being binding on him. They set up also that the
 plaintiff having been an actor in the transactions is pre-
 cluded from objecting to their validity, and from claiming
 any relief on the footing of their being invalid: that the
 plaintiff has since his discovery of the alleged invalidity
 his subscription for the said shares dealt with them as
 property, and contracted for the sale of them. They
 set up laches on the part of the plaintiff, and submit that
 the plaintiff, cannot at all events, in this action impeach
 the said transactions between it and the Society, and that
 he is not entitled to a rescission of his subscription for
 said shares unless the whole transactions can be undone
 and all parties be remitted to their original rights and
 positions, which cannot now be done.

The Society do not plead at so great length as does the
 Association. They say that they were not induced to enter

into the transaction by fraudulent misrepresentation and concealment, as alleged by the plaintiff, and that they have always acquiesced in the transaction, and they admit the validity of it. In other respects their defence seems to be an echo of parts of the defence of the Association.

During the year 1881 there had taken place an amalgamation of the Association and a corporation called "The London Stock and Debenture Company" and another amalgamation of the Association and a company called "The Equitable," &c.

The manner in which these amalgamations were brought about or took place does not appear, nor was it at all discussed at or during the trial; but it appears that in each instance the continuing corporation was under the name of this Association, the name of each of the others ceasing to appear. The former of these amalgamations took place according to the evidence of Mr. Taylor (who was connected with this Association from its beginning, formerly as managing director and afterwards as the manager thereof), on December 9th, 1881, and the latter on the 12th day of the same month.

The Association was, as stated in the pleadings, incorporated under the provisions of the Act, R. S. O. 1877 ch. 150. The charter bears date the 6th day of April, 1880. The amount of the capital stock was \$1,000,000. The number of shares was 20,000, the amount of each share being \$50. The purposes of the incorporation are thus described in the charter: "For buying and selling the various building and loan societies and investment companies stocks of this Province, loaning money and borrowing money upon the same, buying and selling mortgages on real estate, investing money on real estate secured by mortgage, and selling the same, buying, selling and advancing on school, municipal, Provincial and other debentures and public securities, and the stock and debentures of the various building and investment and other societies and companies of the Province; also acting as agent for financial purposes for all the before-mentioned institutions in Ontario and elsewhere."

Judgment.
FERGUSON, J.

Judgment. Supplemental letters patent were issued to the Association on the 17th day of February, 1882, under the provisions of the Act 44 Vic. ch. 18, (O.), and the above mentioned Act confirming a by-law of the Association passed by the directors on the 12th day of December, 1881, for increasing the capital stock thereof from one million to two millions of dollars.

On the 15th day of April, 1882, further supplemental letters patent were issued to the Association under the provisions of the same Acts confirming a by-law of the Association for the further increase of the capital stock thereof from the sum of two million dollars to two million seven hundred thousand dollars. This by-law was apparently passed by the directors of the Association on February 10th, 1882. Each of these supplementary letters received the sanction of the by-law by a proper meeting of shareholders under the provisions of the statutes.

The Society became incorporated under the name "The Superior Savings and Loan Society," under the provisions of the Act known as "An Act respecting Building Societies," being ch. 53 of the Consolidated Statutes of Upper Canada. The declaration seems to have been signed and sealed by twenty-three persons, and bears date March 10th, 1875, and shows that it was received and filed by the Clerk of the Peace at London, in the county of Middlesex, on the 12th day of the same month. No question was raised as to the incorporation of the Society, and it is to be assumed to have been properly done in all respects. Both the Association and the Society carried on their respective businesses; or at least had their head offices in London, I understand, in the city of London, in the county of Middlesex. The amalgamation of the Association and the Society, (I speak of it as an amalgamation, though it is disputed that it was an effectual and good amalgamation, and in some of the pleadings it is spoken of as a "transaction" between the two corporations) appears to have been effected by the adoption by each of a report of a joint committee appointed from the boards of each. T

were preliminary matters that preceded this report, but I ^{Judgment.} do not see that it is necessary to refer to them here. This ^{FERGUSON, J.} report bears date the 10th day of February, 1882, and was, as appears by the exhibits, (copies of the proceedings), on the same day submitted to and unanimously adopted and approved of by a meeting of the shareholders of each, that is to say, a meeting of the shareholders of the Association, and a meeting of the shareholders of the Society.

Although the contents of this report are referred to in the pleadings which I have above abstracted at unusual length, it will, I think, prove convenient to refer to various clauses of it here. These are as follows :

"1. That it is desirable to bring about as speedily as possible an amalgamation of the said Association and Society.

"2. That said Association and Society should arrange to carry on their business under the charter of the Ontario Investment Association.

"3. That the stockholders of the Superior Savings and Loan Society be called upon for a further premium of 17 per cent. upon the subscribed capital, making the average premium paid 25 per cent.

4. "That on completion of payment of the premium mentioned in above clause the Ontario Investment Association assume the assets and liabilities of the said Society, and provide par stock for the stockholders of the said Society equal to the amount of stock they now hold.

"5. That the mortgage securities held by the said Society be taken over by the Ontario Investment Association at their face value.

"6. That the Ontario Investment Association assume the lease of the premises at present occupied by the said Society, and pay for the improvements on said premises.

"7. That the stockholders of the said Society shall have thirty days after the meeting of such stockholders held for the purpose of approving of and sanctioning such amalgamation within which to pay the premium of 17 per cent. referred to in clause 3 hereof without interest, but foreign stockholders shall have such additional time as may be reasonable.

"8. That money be advanced to pay such call by the Ontario Investment Association to the shareholders of the said Society at 6 per cent. per annum, half yearly, for a term of two years if required, on the security of the stock held by them.

"9. Each stockholder of the said Society, on payment of the said 17 per cent. premium, shall be entitled to receive from the Ontario Investment Association stock as he holds in the said Society such shares to be issued and allotted to him as soon as the Association procures supplementary letters patent or an Act authorizing an additional increase of the capital stock of the said Association to upwards of two million dollars (\$2,000,000), said receipts to be similar to those issued to the shareholders of the Equitable Savings and Loan Company.

- Judgment. "10. That the president of the said Society be at once placed upon board of the new Association.
- FERGUSON, J. "11. That this report shall be adopted by the board of each of the companies, and ratified under the corporate seal of each company.
- "12. That such settlement shall be made by The Ontario Investment Association with the present officers of the said Society as shall be met and proper.
- "13. That the books, properties, and securities of the said Society may be transferred to the office of The Ontario Investment Association and placed in the hands of an accountant under the board of the said Society until the amalgamation is fully carried out.
- "14. That a general meeting of the stockholders of each of the companies be called at as early a date as possible.
- "15. That immediately after such meeting the board of the said Society call in the said 17 per cent. premium upon the stock hereinbefore mentioned.
- "16. That in the event of any stockholder of the said Society refusing to pay the 17 per cent. premium, as hereinbefore provided, and to comply in other respects with this report, the board of the said Society shall take such steps as may be within their power to compel such stockholder to pay such premium and comply with the terms of this report or wind up the said Society, as may be necessary.
- "17. The stockholders of the said Society to be paid the same dividend from the 1st day of January, 1882, as the stockholders of the said Association.
- "18. That the board of The Ontario Investment Association, at their general meeting, proceed forthwith to carry out their part of the terms of the amalgamation. All of which is submitted."

This report is signed by the members of the joint committee, and as appears by the exhibits left with me ratified by the corporate seal of each of the companies, as well as the signature of the president of the Society, and those of the manager and president of the Association, but other than these there does not appear to have been any deed of amalgamation, and no legislation on the subject of the amalgamation was procured.

The plaintiff does not seem to dispute that he was an assenting party, or at all events being a stockholder in the said Society, and the manager thereof, a party not objecting in any way to all this or any of it, and counsel for the defendant paid marked attention to a circular bearing date February 13th, 1882, signed by the president of the Society, and countersigned by the plaintiff as manager thereof, c

tending that it is shewn by this that the plaintiff was not ^{Judgment.} only willing and assenting to the amalgamation, but that ^{FERGUSON, J.} he was also active in endeavoring to induce other shareholders in the Society to carry out the terms of such amalgamation.

This circular is addressed to the shareholders of the Society, and is as follows :

"Notwithstanding the success that has attended our efforts during the past year, as shewn in the annual report, the directors have, on mature consideration, thought it advisable, in view of the prospects of continued low rates of interest, and of the saving of working expenses which would necessarily follow, to amalgamate with The Ontario Investment Association, a company that is already strong, and that promises to be one of the strongest in the country, the stock of which is eagerly sought after and saleable at upwards of 34 per cent. premium, and with our amalgamation will undoubtedly increase in value.

"To carry out this object a basis of amalgamation has been arrived at between the directors of the two companies, which is as follows :

"The stockholders of the Superior Savings and Loan Society shall pay in 17 per cent. premium on the stock now held by them, thus equalizing the values of the stocks of each company, and on so doing shall be entitled to receive as many shares in the new company as they now hold in the Superior.

"The new company on completion of the amalgamation will assume all assets and liabilities of the two companies, and will pay dividends alike to the shareholders of each from the 1st of January, 1882. As some shareholders may not be prepared to pay the amount of premium, arrangements have been made by which any shareholder who desires to do so can borrow, on the security of his stock, the amount of said premium at 6 per cent. per annum, payable half yearly, for two years, with the privilege of paying it sooner if desired, without any notice or charge for extra interest.

"It will be readily seen by stockholders, from the terms of amalgamation thus presented, that the premium or bonus they are called upon to pay added to the present cost of their stock will still leave a large profit, with the advantage of a ready market if they choose to sell, or an investment that promises to largely increase in value if they desire to hold it.

"In order that all may be satisfied the agreement stands over for ratification by the stockholders at a meeting to be held at the Society's offices at the corner of Dundas street and Market Lane, London, on Friday, the 24th of February, instant, at 2.30 o'clock p.m., which all stockholders are requested to attend either in person or by proxy. With a view to facilitating matters the enclosed forms of proxy and power of attorney have been prepared, and the directors request any shareholder who cannot

Judgment. attend personally to fill out and sign the same in favor of any person the wish who can attend the meeting.

FERGUSON, J. "To parties not having any person whom they wish to represent then the directors suggest the names of the manager, H. E. Nelles; Henry Taylor, manager of the Ontario Investment Association; Charles Murray, manager of the Federal Bank, London; or Benjamin Cronyn, of the city of London, barrister, who will attend such meeting, and act for them if desired."

This circular as I have said was signed by the president of the Society. It was countersigned in apparently the same way by the plaintiff, acting in his office as manager of the Society, and notwithstanding all that has been urged in regard to this document I do not see that it proves anything against the plaintiff beyond this: that he was cognizant of what was going on, and what had been done in regard to the amalgamation, and that he was willing to act as proxy for any of the shareholders of the Society who might see fit to nominate him so to do, and these I understand the plaintiff has not sought, and does not seek to deny.

Counsel for the defence referred specially to the concluding part of the first paragraph of this circular, where the stock of the Association is spoken of as being stock which was eagerly sought after, and saleable at upwards of thirty-four per cent. premium, &c., and to the statement regarding the equalizing of the stocks of the two companies by the payment of the seventeen per cent. upon the stock of the Society, and contended that I should upon these and in the light afforded by the surrounding facts find as a fact that the only basis upon which the union or amalgamation took place was the market values of the stocks of the companies, respectively (it being true, or there being uncontradicted evidence to shew that stock of the Association had been sold at a rate as high as the thirty-four or perhaps a little higher), and the bargain having been made to pay the seventeen per cent. upon the Society's stock to make it equal to the stock of the Association. It was contended that I should find this, and, as I understood, to the exclusion of the right of the plaintiff or any other person

circumstanced, to charge and rely upon fraud, misrepresentation, or concealment as inducing him to subscribe for ^{Judgment.} stock in the Association after the amalgamation had taken place, and by the same mode of reasoning to the exclusion of the right of any one concerned in the amalgamation, even the Society itself, to complain of frauds or misrepresentations as inducements in bringing about what took place ^{FERGUSON, J.}

This, so far as I am able to perceive, I cannot do. There can, I think, be no doubt that the high market value of the stock of the Association was an element, so to speak, an important factor in bringing about the assent to the amalgamation by the Society, and the stockholders thereof, and that it was put forward as an inducement; but in my view of the matter, it cannot be said to be the sole inducement to the amalgamation and such consent, or to the subscription for stock of the Association after the amalgamation. The substance of the report of the Association of December 31st, 1881, in which it is alleged there were gross and fraudulent misrepresentations respecting the condition of the affairs of the Association, or many of such affairs, was before the committee who made the report in favor of the amalgamation; and it cannot but be assumed that this operated a part, and an important part, in bringing about the concurrence in the report of the committee on which the amalgamation is founded, or rather, which is in fact the amalgamation, or the terms of it; and upon this, at all events, largely, subsequent action of all persons concerned who did act, took place.

This fact of itself, if there were nothing more, is, to my mind, sufficient to defeat the contention in favor of such a finding.

The plaintiff seems to have furnished voluminous particulars of the alleged misrepresentations on which he relies; and these or the more important of them have reference to statements contained in the report of the Association of the 31st of December, 1881, before referred to. It is not, however, I think necessary to refer here to more than a few of such representations.

Judgment. This report of December 31st, 1881, professes to be a statement for the year, ending upon that date. Under the heading, "Cash account," are given receipts and disbursements, after or below which is a statement of assets and liabilities. In the early part of the cash account, under the heading "Receipts," there appears an item called "Repayments on Loans, on Building Society Stock and Debentures, \$779,606.57."

This indicates to me, as I think it would to any person not cognizant of the actual facts, that the Association had during that year received repayments in cash to that amount upon such loans. But Mr. Taylor, the manager of the Association, in his evidence, says "Only a small portion of this \$779,606.57 was cash." It was effected by transfers of stocks; the holder transferring his stock, and being considered as having paid, and the transferee having assumed the liability, this was called "cash." By what mode of reasoning in respect of the facts, or what mode of treatment of language the Association were enabled to call this "Repayments," under the heading "Cash account" "on loans, on building society stocks and debentures," I am entirely unable to perceive. The stock in this Association was not building society stock at all. If it had been such stock, the statement would have been but little nearer being true. The only conclusion that can be arrived at is in my opinion, the one that the statement is absolutely false. Under the same heading "Receipts" in the cash account, there are two items, one being "London Stock Debenture and Investment Company, \$100,000.00;" the other "Equitable Savings and Loan Company, \$90,000.00." The evidence of the manager shows, in a way, how these figures were arrived at, which was by certain calculations and the allowance of certain percentages in respect of stocks; I may say the farthest possible thing from actual receipts in cash as represented by the statement. These statements have, I think, also been shown to have been absolutely false.

Then under the heading "assets," there is an item "cash value of loans on building society stocks and debentures, ^{Judgment.} \$815,609.79." A large part of this item is shewn to have been composed of loans upon unpaid stock of the Association itself. The books of the Association, which were in Court and proved, show that on December 3rd, 1881, the sum of \$178,550 of this item, was composed of loans to one John Hunter upon stocks of the Association, and the evidence shows that this stock did not belong to John Hunter, but did belong to the Association ; the name of John Hunter having been used (with his consent however) by the Association or its officers for their own purpose in making the transactions. This sum with accrued interest, amounted on December 31st, 1881, to about \$178,000. ^{FERGUSON, J.}

The books shew other transactions in the name of John Hunter, in which the evidence shews that John Hunter had no interest whatsoever, these being in respect of loans upon securities which were not of the kind mentioned in the item of the report referred to, the whole amounting to a sum not far from the round sum of \$204,000, or in the neighborhood of one-fourth part of the large item of \$815,609. 78, " cash value of loans on building society stock and debentures."

The evidence of John Hunter on this subject was, I think, honestly given, and in a way that was somewhat amusing. He was unable, however, to impart any useful knowledge that was relevant excepting that he had no interest in the matters referred to, and never had had any : that he knew his name was being used ; that he had confidence in the men who were using it ; and that he believed they would keep him safe.

Evidence was given in regard to many other items of this statement shewing that they were erroneous, but I do not think it necessary to detail these matters here. It was not contended by the defence that this statement of December 31st, 1881, could be supported as a true statement.

The manager, Mr. Taylor, in his evidence says that \$937,000 of the stock of the association was loaned upon

Judgment. and that upon this stock only \$2,000 had been paid: that the amount loaned upon it was \$194,451, being about 22 per cent. of the whole, the professed reserve being at the time, as I understand, about 16 per cent. To me it appeared, and still appears (if the matter can be understood at all), that as to about 6 per cent. of the moneys borrowed in this way, men borrowed money from the Association upon securities that were nothing more or less than their own indebtedness to the Association.

FERGUSON, J. The manager also says that the Association is not a building society, and that a large portion of this \$815,609.78 is composed of loans on the stock of the Association, and he says that he cannot say why \$200,000 or \$300,000 that were loaned on the Association's own stock were put into the balance sheet of the 31st of December, 1881, as loaned on building society's stock, but I can scarcely think that he was so innocent as to this matter. There is much in the evidence shewing that the Association did not desire that it should appear that there had been lending to a large extent upon their own stock, but more particularly when they themselves (the Association) were the owners of the stock, and I think Mr. Taylor must have been cognizant of this.

Now I do not see that it is necessary that I should here follow out the matters shewn to be wrong respecting items contained in this report of December 31st, 1881.

I think it has been shewn beyond doubt, and that it plainly appears that this report contains many representations that were material, that were false, and that were fraudulently made: I do not see how the contrary of this finding could be successfully contended for on the evidence.

At the trial a discussion arose respecting the sufficiency of the pleadings to permit the plaintiff to proceed successfully in respect of that part of his case which asks to have it declared that his subscription for stock in the Association was obtained by fraud, misrepresentation, and concealment, and that the same is not binding upon him without calling for a decision upon the more weighty matter raised, namely

as to whether or not the amalgamation of the two companies was good and valid.

Judgment
FERGUSON, J.

As I understood plaintiff's counsel, what his client really, wanted was to be relieved from liability in respect of this subscription, and that if he succeeded in this respect he was not desirous of having the larger question determined in this action.

Defendants' counsel in contending that the plaintiff's pleading was not sufficient for this purpose relied upon Rule 134, which says: "where the plaintiff seeks relief in respect of several distinct claims or causes of complaint founded on separate and distinct facts, they shall be stated as far as may be separately and distinctly."

The statement of claim says, paragraph six, that the amalgamation, the plaintiff's consent thereto, and the subscription by the plaintiff for the stock in the Association were brought about and obtained by the fraudulent misrepresentations, &c., referred to, and in his prayer for relief the plaintiff asks in the alternative clearly, separately, and distinctly as above. I do not see that the plaintiff's several causes of complaint are founded on separate and distinct facts.

It seems to me that they are founded on the same facts. He asks one relief or the other, or both, placing his right to each kind or character of relief on the same facts.

Besides the plaintiff's pleading is for this purpose an unmistakeable pleading, and no one could, I think, be in any degree misled by it, and I am of the same opinion as at the trial, namely, that the pleading is sufficient and not objectionable for the purpose, and I propose now to consider whether or not the plaintiff has shewn that he is entitled to the relief claimed by this alternative prayer in his statement of claim.

It was contended that the plaintiff had not seen this report of the December 31st, 1881, until after the amalgamation had taken place and until long after the circular of the 13th of February, 1882, which was countersigned by the plaintiff, had been issued; that the whole matter from

Judgment. beginning to end was to be considered as one transaction or matter, and that for these reasons the plaintiff could not have been induced by anything contained in the report of December 31st, 1881, to subscribe for the stock in the Association, which subscription did not, however, as a fact, take place till October following. The plaintiff says he did see the statement at an earlier day, but it is beyond doubt that he did see it as early as the 22nd or 24th February, 1882, and I do not see that it can make any difference if his action or conduct up to that period be attributed, or rather the inducement to his conduct up to that time be attributed to the report of the joint committee or any other cause, for I think it was plainly in the power of the plaintiff, after all that had occurred in respect of the amalgamation, and after all that he had done in regard to it, if anything, (for he says he took no personal part in the negotiations that led up to the amalgamation) to decline to subscribe for the stock in the Association, or to become liable in respect of any stock therein.

FERGUSON, J. In *Pontifex v. Bignold*, 3 M. & G. 63, it was held that an action was well brought against an insurance company for misrepresentation as to the mode in which their business was conducted, by which the plaintiff had been induced to insure. And it seems to be well established that in order to enable a person injured by a false representation to sue for damages it is not necessary that the representation should be made to the plaintiff directly. It is sufficient if the representation is made to a third person to be communicated to the plaintiff, or to be communicated to a class of persons of whom the plaintiff is one; or even if it is made to the public generally with the view of it being acted upon, and the plaintiff as one of the public acts upon it, and suffers damages thereby: *Swift v. Winsterbotham*, L. R. 8 Q. B. 245, cited in *Richardson v. Siverster*, L. R. 9 Q. B. 34. Taking this to be the law on the subject, surely these representations (those in the report of December 31st, 1881), were sufficiently made to the plaintiff if that were the sole question in contention.

It is, however, not enough that the representation may ^{Judgment.} have remotely or indirectly contributed to the transaction. ^{FERGUSON, J.} A representation goes for nothing unless it is the proximate and immediate cause of the transaction. The representation must be the very ground on which the transaction takes place. The transaction must be a necessary and not merely an indirect result of the representation. It is not, however, necessary in order to sustain the action that the representation should have been the sole cause of the transaction. It is enough that it may have constituted a material inducement. If any one of several statements, all in their nature more or less capable of leading a person to whom they are addressed, to adopt a particular line of conduct be untrue, the whole transaction is considered as having been fraudulently obtained; for it is impossible to say that the untrue statement may not have been precisely that which turned the scale in the mind of the person to whom it was addressed. See *Kerr on Fraud and Mistake*, 2nd ed., p. 35, and the authorities there referred to.

At the same page the same author says: "A man who has made a false representation in respect of a material matter must, in order to be able to rely on the defence that the transaction was not entered into on the faith of the representation, be able to prove to demonstration that it was not relied on." From an examination of the authorities apparently relied on by the author for this last proposition it might be thought by some that the words used "able to prove to demonstration" are perhaps a little too full and strong, and that if the defendant is able to prove the fact in the same manner as that in which an issue is ordinarily proved that would be sufficient. However this may be it can make no difference in the present case, because the defence did not so far as I perceive, give any evidence to show that the plaintiff did not in fact rely upon these representations in subscribing for the stock in the Association.

The representations were made to him. They were not such as only remotely or indirectly to contribute to the

Judgment. transaction taking place. They were of the very grounds
FERGUSON, J. on which such a transaction would take place. They may not have constituted the sole ground in the present instance, but this is not necessary for the plaintiff's case.

The representations were made by the Association. They were material, it seems to me of very great materiality. They were made to the plaintiff in the eye of the law and with the view of his acting upon them. They were misleading and false and fraudulent, and according to the law it must be assumed upon the evidence that the plaintiff did act upon them when he subscribed for the stock in the Association.

It was contended for the defence that even assuming such to be the facts and the case yet the plaintiff should not succeed because representations of a similar or analogous kind or character had been made by the Superior Society, of which he was an officer and stockholder, and that moneys had been loaned by that society in a manner similar, or somewhat similar, to what has been pointed out above regarding the transactions of the Association. I do not find this as a defence in the pleadings. It is, however, I think, enough to say here that the analogy contended for was not proved to have existed. And even if this had been proved I do not see how it could constitute a good answer to the plaintiff's contention.

As to the contention that the plaintiff was put upon inquiry by his having seen the reports of the Association for subsequent years, &c.

The allegation of misrepresentation may be effectually met by proof that the party complaining was well aware and cognizant of the real facts of the case, but the proof of knowledge must be clear and conclusive.

Misrepresentation is not to be got rid of by constructive notice. A man who by misrepresentation or concealment has misled another cannot be heard to say that he might have known the truth by proper inquiry, but must, in order to be able to rely on the defence that he knew the representation was untrue, be able to establish the fact by

evidence. See the remarks of Lord Chelmsford in *The Judgment. Central Venezuela R. W. Co. v. Kisch*, L. R. 2 H. L. at p. FERGUSON, J. 121: and see *Kerr* on Fraud and Mistake, at p. 39.

It was also contended that the plaintiff could not be relieved because he had sold and transferred a part of the stock. This was placed under the 6th paragraph in the defence. This, it will be remembered, states that after the plaintiff's subscription for this stock he sold, &c., 150 of the shares, and that some of the transferees again transferred the shares, so that the same cannot be traced or identified. This pleading has not been proved. The transfers made by the plaintiff were of stock of the Society and not of the Association. Two of such transfers were made on March 14th, 1882, and one in September, 1882, the plaintiff's subscription for stock in the Association being some time in October, 1882.

Two of such transfers by the plaintiff are put in. One is of 84 shares of the accumulating stock of the Superior, &c., Society. The other is of 16 shares of the same stock. Both are dated March 14th, 1882. The plaintiff says that this was the date of the transactions, and there is no evidence to the contrary of this. Another transfer of 50 shares is shewn. This bears date the sixth day of September, 1882. It professes to be a transfer of shares in the Ontario, &c., Association. The plaintiff says that this was intended to be, and was in fact a sale and transfer of stock of the Society, and not of the Association; and I think suggests that the error came about by the use of a blank form of the Association. This is not contradicted, and it was, as already said, before his subscription for stock in the Association, and the fact appears that he had before this time, and after the amalgamation, made the two transfers of stock, which was stock of the Society. The plaintiff takes the position that, although he in fact subscribed for 251 shares in the Association, he was really a subscriber for 101 shares only; and says that the subscription for the 251 shares was by the persuasion of Mr. Taylor, the manager of the Associa-

Judgment. tion, and in apparent conformity with the terms of the
FERGUSON, J. amalgamation that the shareholders in the Society should be entitled to as many shares in the Association as they have in the Society. The loan made on March 24th, 1884, rather seems to support this view of the matter. The loan is made upon 101 shares. The document is on a blank form of the Association, with the name struck out, and that of the London Stock Debenture and Investment Company substituted. The plaintiff says this loan was obtained from Taylor, the manager of the Association, and the 12th paragraph of the statement of the defence seems to show how it came about. The \$858.50 there mentioned being just 17 per cent. on the par value of the 101 shares. The two sums mentioned in that paragraph, represent the same loan, and it was agreed by counsel at the trial that these 101 shares are charged with this \$954.08 and nothing more.

This London Stock Debenture and Loan Company, it will be remembered, had long before been amalgamated with the Association, and had virtually ceased to exist. This name was used by the manager of the Association; but I think it manifest that the transaction was with the Association. As to the shares (the 150 that were sold by the plaintiff) these were not shares of the Association, but even if it were considered that they were, on the ground that the plaintiff was entitled under the terms of the amalgamation to have the whole 251 shares in the Association, all would have been one kind of shares, and according to the reasoning of Vice Chancellor Wood in *Maturin v. Tredennick*, 12 W. R. at p. 740, the sale of them would not, I think, have of itself disentitled the plaintiff to relief in respect of the 101 shares. The learned Judge after referring to a different case where the shares were of different descriptions, says: "Where, however, a number of shares in one mine had been bought, and a portion had been sold, those sold and those remaining fluctuated in value together so that the contract became perfectly severable, and might be still rescinded as regarded the portion still remaining unsold."

I think, however, the true way of looking at this branch Judgment. of the present case is, that the plaintiff had only the 101 FERGUSON, J. shares of the Association, these being all that he was entitled to have after his sale of the 150 of the other shares; and that these 101 shares are pledged as agreed by counsel for the \$954.09; but, in either view, I do not think the defendants' contention can succeed, that is to say, I am of the opinion that these transactions do not stand in the way of the plaintiff obtaining relief in regard to his liability upon or in respect of his subscription for this stock.

Then as to the alleged delay of the plaintiff, in the case *Lindsay Petroleum Co. v. Hurd*, L. R. 5 P. C. 221, the rule seems to have been laid down thus: "Fraud being established against a party, it is for him, if he alleges laches against the other party, to shew when the latter acquired a knowledge of the truth, and prove that he knowingly forebore to assert his right."

The plaintiff says that he did not know or suspect the existence of the misrepresentations of which he now complains till in the latter part of 1887. This action is brought on October 6th, 1887. The defendants sought to shew that the plaintiff acquired knowledge of the truth at least as early as at the meeting of the 3rd of August, 1887, at which the report of a committee was read. In this I think the defendants utterly failed. It was left, to say the very least, doubtful whether or not the plaintiff had heard all this report read, and if it be assumed against him that he did this would not have disclosed to him the truth in respect to the matters now complained of. There is nothing in that report reaching to the truth in regard to these particular misrepresentations of which the plaintiff complains. I think I need not here refer to the evidence further on the subject of alleged delay, for it seems to me clear that the defendants have not done those two things that in *Lindsay v. Hurd* are said to be necessary in order to entitle them to succeed upon this contention.

Judgment.

FERGUSON, J. Then in regard to the contentions arising upon the 17th and following paragraph of the defence there does not seem to be in effect anything proved beyond this, that the defendant Association, after the amalgamation, and at comparatively recent periods, borrowed very large sums of money from persons residing in Great Britain on the faith of the apparently existing state of things, and that the Association is still largely indebted. It is not shewn that the plaintiff acquiesced in or took any part whatever in these transactions after he had knowledge of the frauds or misrepresentations of which he now complains.

It is urged for the defence that the position and rights of the creditors of the Association should be considered, and that it would be highly improper now to permit the plaintiff to obtain a rescission of the contract to take shares in the Association—that is, his subscription for shares—even on the ground of fraud.

The evidence does not shew that the Association has failed to pay any debt that has fallen due. It is not in liquidation or being wound up. No creditors are here represented. It is not shewn that the Association is insolvent or on the eve of insolvency. It is not shewn that any of those things mentioned in the Winding up Act as a ground for obtaining against the Association a winding up order has occurred or taken place.

Although there are differences between our Act and the English Act, the law that I think applicable in the plaintiff's favor is plainly stated by Earl Cairns in the case *Tennent v. City of Glasgow Bank*, 4 App. Cas. at pp. 621, 622. That very learned Judge says :

“The case of *Oakes v. Turquand*, L. R. 2 H. L. 325, in this House, has established that it is too late, after winding up has commenced, to rescind a contract for shares on the ground of fraud. This, no doubt, is on the ground stated by the Lord President, that innocent third parties have acquired rights which would be defeated by the rescission. The case *Oakes v. Turquand*, however, while it decided negatively that a contract could not be rescinded on the

ground of fraud after a winding up had commenced, did ^{Judgment.} not decide affirmatively the converse proposition, that up ^{FERGUSON, J.} to the time of the commencement of the winding up a contract to take shares could be rescinded on the ground of fraud. Whether it can or cannot be so rescinded up to that time must, I think, depend upon the particular circumstances of the case."

Further on, at p. 622, the learned Judge says: "So long as the company is a going concern, a shareholder who has been induced to take up shares by the fraud of the company has the right to throw back his shares upon the company without reference to any claims of creditors. He would have a right to transfer his shares without reference to creditors. The company, as a going concern, is assumed to be solvent, and able to meet its engagements, and to have a surplus, and the company being solvent, its duty is to pay the repudiating shareholder what is due to him, and to take the shares off his hands; is an affair of the company and not of the creditors. But if the company has become insolvent, and has stopped payment then, irrespective of winding up, a wholly different state of things appears to me to arise. The assumption of new liabilities under such circumstances is an affair, not of the company, but of its creditors. The repudiation of shares which, while the company was solvent, would not or need not have inflicted any injury upon the creditors, must now necessarily inflict a serious injury upon creditors. I should, therefore, be disposed in any case to hesitate before admitting that, after a company has become insolvent and stopped payment, whether a winding up has commenced or not, a rescission of a contract to take shares could be permitted as against creditors."

Now, taking these proposition as stating the law upon the subject, and looking at the position of the Association as I have endeavoured to state it to be upon the evidence given in this case, I think it clear that neither the existence of large creditors of the Association, nor the fact of the transactions whereby they became creditors of the Asso-

Judgment. ciation having been made under the circumstances that
FERGUSON, J. appear, can be allowed to stand in the way of the plaintiff
obtaining a rescission of his contract on the ground of
fraud, if it be assumed that he is otherwise entitled to
such rescission.

It seems to me now that I have have, in this complicated case, considered as well as I have been able, all the matters that relate to the plaintiff's right to have a rescission of the contract made by him by his subscription of stock. I think he has come with sufficient promptitude after the discovery of the frauds practised upon him; and I am of the opinion that on the whole case in this respect the plaintiff is entitled to such rescission; and I think I need not at present offer any opinion as to whether or not the amalgamation of the Association and the Society is legal and valid. I think the plaintiff is entitled to his costs as against the Association.

The pledge of the stock to the Association for the \$954.09, does not, I think, stand in the way of this relief. Any arrangement as to this charge, may be mentioned on settling the minutes of the judgment if necessary, as well as any claim the Society may consider they have in respect of costs of the action.

A. H. F. L.

[COMMON PLEAS DIVISION.]

REGINA V. KENNEDY.

Canada Temperance Act—Conviction of defendant in his absence—Proof of former convictions by certificate.

The defendant, having been summoned for selling liquor contrary to the second part of the Canada Temperance Act, appeared with his counsel at the hearing and pleaded not guilty, when evidence was given for the prosecution justifying a conviction; but, at the defendant's request, an adjournment was granted. At the adjourned hearing, at which neither defendant or his counsel appeared, evidence was given of the service of the summons and of the facts that transpired at the prior hearing, and certificates of two prior convictions were put in, and the identity of the defendant proved. The defendant was found guilty and convicted of a third offence against the said Act.

Held, that the defendant, having once had the opportunity to defend, could not, by his failure to appear at the adjourned hearing, defeat the administration of justice; and therefore he was properly found guilty in his absence.

Held, also, that the proof of the former convictions by the certificates was sufficient

Regina v. Kennedy, 10 O. R. 396, at p. 402, not followed.

THIS was an application to quash a conviction for a third offence against the second part of the Canada Temperance Act, namely for the sale of liquor. The grounds taken were that the defendant was convicted in his absence; and also that there was no sufficient proof of a former conviction so as to constitute the conviction in question one for a third offence. Statement.

In Hilary Sittings, February 11, 1889, *Aylesworth* supported the motion, and referred to *Regina v. Greene*, 8 C. L. T. 142; R. S. C. ch. 178, secs. 51, 86; Harris' Criminal Law, 4th ed., p. 478; Burn's Justice of the Peace, 13th ed. vol. iii. p. 59; *Hawkins* P. C. ch. 48, sec. 22, p. 634; *Duke's Case*, 1 Salk. 400; *Rex v. Hann*, 3 Burr. 1786; *Regina v. Brady*, 12 O. R. 358 363; Stone's Justices Manual, 23rd ed., p. 44, note (O); *Regina v. Kennedy*, 10 O. R. 396, 402.

Delamere, contra, referred to Paley on Convictions, 102; Burn's Justice of the Peace, 13th ed., vol. iii., 59; *Rex v. Simpson*, 1 Str. 44; R. S. C. ch. 178, secs. 49, 51-52, 86.

Judgment. **March 8, 1889. ROSE, J. :—**

ROSE, J.

The conviction was for a third offence against the second part of the Canada Temperance Act. The defendant, with his counsel, attended at the hearing, when witnesses were examined for the prosecution, and evidence given justifying a conviction if the Justice gave credence to the statements.

The defendant's counsel then asked for an adjournment to prepare his defence, which was granted. The Court met at the time and place appointed upon the adjournment, but neither the defendant nor his counsel appeared, whereupon judgment was given, and the defendant adjudged guilty of the offence charged.

The prosecutor, the inspector for the county of Oxford, then gave evidence, proving service of the summons on the defendant, his appearance by counsel, the adjournment, the plea of not guilty, the fact that evidence was given, the asking for the adjournment, and the failure to appear; and put in certificates of two previous convictions.

The magistrate then held that the previous convictions were proven; and found the defendant guilty of a third offence against the second part of the Canada Temperance Act.

It is objected that it was not within the power of the magistrate to convict the defendant in his absence, as the punishment must be corporal, referring to Burn's Justice of the Peace, 13th ed., vol. iii, p. 59.

It may be that an examination of the cases will shew that the Court has the power to award punishment in the absence of a defendant in misdemeanours, but will not ordinarily do so. See *Rex v. Hann*, 3 Burr. 1786.

In *Regina v. Simpson*, Temp. 13 Ann. 10 Mod. 248, 341, 378, Parker, C.J., said, "that the rule of natural justice that the offender should be heard before he is condemned," is subject to the limitation, viz., "unless the party refuse to appear."

There it was held that justices of the peace may convict an offender in his absence upon his default to appear after being duly summoned.

Since then, according to Paley on Convictions, 6th ed., p. 102, it has not been doubted that a defendant might be convicted in his absence.

Judgment.
Rose, J.

See *S. C. 1 Str. 44*. But all doubt is set at rest by our Summary Convictions Act, R. S. C. ch. 178, secs. 47 to 52.

We have just held in *Regina v. Mabee*, *post* 194, that under sec. 39, upon proof of service on the defendant, either personally or by leaving the summons with some one for him as directed by sec. 14 of the Act, the magistrate may proceed to hear, determine, and convict; and we must, in the same line, hold that when the defendant has once had an opportunity to defend, and does not, he cannot defeat the administration of justice by refusing to appear.

It was also objected that proof of the former conviction was not sufficient.

The convicting magistrate was the same in the three cases. His conviction was put in, sufficiently stating the facts. The inspector was sworn, and stated that the defendant was the same person mentioned in the conviction, and was previously convicted as alleged therein.

The Canada Temperance Act, ch. 106 sec. 115, sub-sec. 6, provides that "The number of such previous convictions shall be provable by the production of a certificate under the hand of the convicting justices or magistrate, or officer, or of the clerk of the peace, without proof of his signature or official character, or by other satisfactory evidence."

Mr. Aylesworth argued that such certificate was only to prove the number of convictions, but it did not prove the conviction which should be proved by a certified copy of the conviction under sec. 86, ch. 178.

Such certified copy of conviction would be a convenient mode of proving the conviction, but I cannot see the convenience or necessity of providing that the number may be proved by a certificate if the prior conviction itself must be proved by a certified copy, such certified copy would shew the number, *i. e.*, whether first, second, or

Judgment.

Rose, J.

third, and a conviction to prove such number would be a useless thing

I am of the opinion, therefore, that the certificate referred to in sub-sec. *b*, means a certificate shewing whether the conviction therein referred to is a first, second, or third; and if the certificate contains a sufficient statement of fact of the conviction, and if the identity of the defendant with the person named in the certificate is established, as was done here, I do not see why such evidence should not be held sufficient.

The requirement, "or by other satisfactory evidence," would be satisfied by a certified copy of a previous conviction; but I do not say that other evidence than a certificate under sub-sec. *b*, or under sec. 86, would not be satisfactory evidence.

I therefore give effect to the opinion to which I inclined in *Regina v. Clark*, 15 O. R. at p. 50, and which I left myself open to express in *Regina v. Edgar*, 15 O. R. 144; and decline to follow the opinion expressed by the late Mr. Justice O'Connor in *Regina v. Kennedy*, 10 O. R. at p. 402.

It was also objected that the previous convictions were not set out with sufficient certainty in the information, it not being stated before what magistrate they were had. At this stage such objection has no force. There was quite sufficient information given to enable the defendant to know what he was charged with; and the evidence supplies the omission referred to.

The motion fails, and will be dismissed with costs.

GALT, C. J., and MACMAHON, J., concurred.

Motion dismissed with costs.

[COMMON PLEAS DIVISION.]

WOOD V. McPHERSON.

Jury—Challenge—Bias of jury—Change of venue.

At the trial of an action the defendant's counsel challenged a juryman for cause. On the trial Judge stating that he did not think any cause was shewn, and that the counsel had better challenge peremptorily, the counsel did not claim the right to try the sufficiency of any cause against the impartiality of the juryman, but accepted the opinion of the Judge, and the juryman remained on the jury.

Held, that on a motion for a new trial an objection to the juryman could not be entertained.

The action was tried at Brantford, and a new trial was moved for at a place other than Brantford, because the jury there were biassed against defendant.

Held, that this formed no ground for a new trial.

THIS was an action, in the County Court, directed to be Statement.
tried at the Assizes. The action was brought to recover the amount of two promissory notes for \$150, made by the defendant in favour of a person named Jones or bearer, and transferred by him to the plaintiff.

The defence was that the defendant did not make the notes; and secondly, that they were obtained by fraud on the part of Jones, and that the plaintiff took them with knowledge of the fraud.

The cause was tried before MACMAHON, J., and a jury, at Brantford at the Fall Assizes of 1888.

A good deal of evidence was given at the trial, and the learned Judge reviewed it fully in his charge to the jury.

The jury found a verdict in favour of the plaintiff.

In Michaelmas Sittings, 1888, *Ermatinger*, Q.C., moved, on notice, on grounds set out in the judgment of Galt C. J., to set aside the judgment entered for the plaintiff and to enter judgment for the defendant.

In the same Sittings, *Ermatinger*, Q. C., supported the motion, and referred to *Thornton* on Juries, p. 101 sec. 112; *Cornish* on Juries, 88; 1 *Archbold*, Q. B. Prac., 13th ed., p.

Argument. 391; *Bailey v. Macaulay*, 13 Q. B. 815; *Graham & Waterman* on New Trials, vol. ii., p. 240; *Abbott's Trial Brief*, 21, 22; *Anonymous*, 1 Salk. 152.

Wallace Nesbitt, contra, referred to R. S. O. ch. 52, secs. 108, 110; *Regina v. Smith*, 38 U. C. R. 218, 238; *Viner's Abridgt.*, vol. 21, pp. 268, 272, 285.

December 22, 1888. GALT, C. J. :—

The notice of motion in this case was based on the following objections:

1. That there should be a new trial, at such time and place, other than the city of Brantford, as the Court may direct, on the ground that the jury at the said trial were biassed against the defendant McPherson, and in favour of the plaintiff.

I may dispose of this objection by the observation that if it was allowed to prevail there must necessarily be a new trial in every case, as there is nothing shewn except that the jury believed the evidence of the plaintiff, and disbelieved that of the defendant, and found a verdict accordingly.

2. That a juror challenged for good and sufficient cause was not excluded from serving on the jury; and this really formed the principal argument before us. I therefore transcribe what appears on the reporter's notes:

"Mr. Ermatinger challenged juryman Lapier for cause. I understood that Mr. Lapier was president, or in some way connected with the Seed Wheat Company, a similar institution to this one. I have understood that he was connected with the Ontario Grain Seed Company, and sold Mr. Wood some 12,000 bushels of oats (q. \$12,000 of notes)—Had you any connection with that institution? I was at two or three meetings. Director? No. A member of it? I was not. Who was president of the company, your brother? I believe he was.

His Lordship.—I do not think there is any cause shewn; you had better challenge him peremptorily.

Mr. Ermatinger.—Perhaps he has formed an opinion.

Mr. Lapier.—I would rather be off the jury.

His Lordship.—I do not think there is any cause shewn for challenging him; you had better challenge him peremptorily if you wish.

(Mr. Lapier remains on the jury.)

Mr. Ermatinger contended strenuously before us that the learned Judge was in error in himself deciding that the cause assigned was not sufficient. Judgment.
GALT, C.J.

The learned Judge did not so decide except in so far as the cause alleged was insufficient; and if the learned counsel, from his anxiety not to exhaust his peremptory challenges, did not choose to adopt the course suggested by the learned Judge, he might have had the question settled by *triers*, or the juryman might have been sworn on the *voir dire*. All that the learned Judge did was to say that the cause alleged was not sufficient cause.

The course pursued by the learned Judge was precisely the same as that taken by the Chief Baron on the trial of Francis Francia for high treason: 3 Geo. I., Howell's S. T. vol. 15, p. 897:

A juryman, Sir Dennis Dutry, was called.

Prisoner.—He has had a quarrel with me, and there was a suit depending between us about seven years ago: and I challenge him for cause.

Attorney-General.—He may challenge him peremptorily, if he will. But if he challenge him for cause, he must prove it.

Prisoner.—Sir Dennis will not deny it.

L. C. Baron.—If you challenge him, you must prove your challenge. Do you challenge him for cause, or peremptorily.

Prisoner.—For cause.

L. C. Baron.—That which you assign is no cause.

This is precisely what was done in the present case. In the case to which I have referred the juryman was sworn on the *voir dire*, and as no sufficient cause was shewn, the prisoner challenged him peremptorily. In the present case the learned counsel at the trial never claimed the right to try the sufficiency of any cause against the impartiality of the juryman; he accepted the opinion of the learned Judge, and cannot now be heard against the course adopted by himself.

It appears to me this objection is concluded by authority. In *Doe d. Earl of Ashburnham v. Michael*, 16 Q. B. 620, a case tried by a special jury, after the jury had retired to consider their verdict, their names called over. On their return into Court it was discovered there had been a mistake as to

Judgment. one of the jurors. The defendant objected to take the
GALT, C.J. verdict of the jury so impanelled. The plaintiff insisted
on taking it; and they gave their verdict for the plaintiff.
It was held there must be a new trial.

Patteson, J., delivered the judgment of the Court, at p. 622: "The defect having been discovered and insisted on before the verdict was given, we think it is one that cannot be passed over, and that we must make the rule absolute for a *venire de novo*. If it had been discovered after verdict, the question would have been a very different one."

In *Widder v. Buffalo and Lake Huron R. W. Co.*, 24 U. C. R. 520, which was an action on an award in which the jury had given a verdict for defendants, one of the grounds taken by the plaintiff, in moving for a new trial, was, as stated by Hagarty, J., at p. 533: "The alleged improper dealing by the defendants with the jurors." In giving judgment, after citing the above case and another in our own Court which has not been reported except in the notes to the principal case, he says, at p. 534: "Independently of authority, the reason of the thing would naturally suggest that a plaintiff, clearly aware of a fatal objection to a jury about to try his case, should not, after electing to take his chance of a verdict, be heard urging an objection which he was quite willing to waive had the verdict been in his favour." The Court granted a new trial, but not on that ground.

[There were other grounds taken in the judgment, but as they are not material, they are not reported.]

ROSE, J., and McMAHON, J., concurred.

Motion dismissed with costs.

[COMMON PLEAS DIVISION.]

FERGUSON V. ROBLIN ET AL.

Master and servant—Responsibility of master for act of servant—Joint wrongdoers.

Under a hire receipt of an organ sold by defendant R., to plaintiff's son, and signed by the latter, the defendant R. was authorized on default of payment to resume possession of the organ, and he and his agent were given full right and liberty to enter any house or premises where the organ might be, with authority to remove the same, without resorting to any legal process. Default having been made in payment of certain instalments due under the hire receipt, defendant R. sent his bookkeeper, the other defendant, and two assistants, with instructions to get the organ. The bookkeeper taking the hire receipt as his authority, went to plaintiff's house, where the organ was, opened the house door and entered the hall, but on his attempting to open the door of the room in which the organ was, the plaintiff's wife, (the plaintiff and the son being absent) resisted his entrance, when a scuffle ensued, and the plaintiff's wife was injured.

Held, that R. was responsible for the acts of his servant, the bookkeeper, for they were done by him in the discharge of what he believed to be his duty, and were within the general scope of his authority.

Held, also, that the judgment against both R. and the bookkeeper was maintainable, for it was recovered against them as joint wrong-doers. *Murphy v. Corporation of Ottawa*, 13 O. R. 334, distinguished.

'THIS action was tried before Street, J. and a jury, at Statement.
Toronto, at the Spring Assizes of 1888.

The statement of claim alleged that the defendants by force and violence entered the plaintiff's house and forcibly removed an organ and stool.

2. That the defendant forcibly entered the plaintiff's house and assaulted the plaintiff's wife, and injured her, whereby the plaintiff lost the society of his wife, and was put to expense for medical attendance.

The defendants denied the allegations in the statement of claim; and alleged they removed the organ and stool without force or violence.

At the close of the case the learned Judge submitted the following questions to the jury :

1. Was the house in question the house of the plaintiff, or was it the house of the wife, and not of the plaintiff?

Answer: plaintiff.

Statement.

2. Did the plaintiff's wife, either in her own name or in the name of her son, become a party to the agreement signed by her son, or agree to the terms of it before the organ was delivered? Answer: No.

3. Was Ruse present at the house when the organ was taken away? Answer: No.

4. Did the defendants, or either of them, forcibly enter the premises; if so, which of them did? Answer: Roblin.

5. Was the organ removed by force from the premises? Answer: No.

6. Was the plaintiff's wife bruised or injured by the defendants or either of them? Answer: Yes—Roblin.

7. If the plaintiff is entitled to damages, what amount is he entitled to? \$250.

8. If the defendant Ruse was not present when the organ was removed from the plaintiff's premises, had he given to his servants any other instruction except that they were to go and get the organ? Answer: We think not.

The learned Judge reserved his decision, and subsequently delivered the following judgment:

STREET, J.—The jury have found that the defendant Ruse was not present when the trespasses in question were committed; and that the only instructions he gave to Roblin were to go and get the organ.

These instructions apparently involved the going into the house of the plaintiff for the organ; whether they did or not involve this, Roblin evidently thought that they did, and that in going into the house he was acting within the scope of his employment.

The uncereemonious manner in which he entered was the initial trespass, and appears to have caused the assault which followed; the plaintiff's wife thinking that Roblin and his companion McDowell were hall thieves, strenuously resisted them; they, on their part, thought that her object in resisting them was to prevent their removing the organ for which they had been sent, and accordingly one of them held her in a corner while the other took out the organ.

The rule is that the master is liable not only for the negligence, but for the tortious acts of the servant whenever they are such as come within the scope of the servant's

general duty, and are done by him under the idea that he is carrying out his master's instructions, although in doing the act complained of he has exceeded his authority either in doing such an act at all, or in the manner in which he has done it.

I cannot distinguish the present case upon principle from *Bayley v. Manchester, Sheffield, and Lincolnshire R. W. Co.*, L. R. 7 C. P. 415, and L. R. 8 C. P. 148. There the servant of the railway company had received printed instructions which made it his duty, among other things, to prevent passengers from getting into the wrong train; he thought that the plaintiff was on the wrong train, and violently dragged him from the carriage in which he had properly taken his seat; and the company was held responsible, upon the ground that they had necessarily reposed in their servant a discretion as to the manner in which his instructions were to be carried out, and were liable for what he honestly did in the exercise of that discretion however improperly he might have exercised it.

See also *Limpus v. General Omnibus Co.*, 1 H. & C. 526; *Austin v. Davis*, 7 A. R. 478; on the other hand *McManus v. Crichett*, 1 East 106; *Croft v. Alison*, 4 B. & Al. 590; *Poulton v. London and Southwestern R. W. Co.*, 8 B. & S. 616, are instances in which the master has been held not liable because the acts done were held to have been done outside the scope of the servant's employment.

I think that the acts here complained of must be held to have been done by Roblin within the scope of what he believed to be his duty, and within the general scope of his employment; and that the plaintiff should have judgment against both defendants for the \$250 damages which the jury have awarded.

In Easter Sittings, *Bigelow* for the defendant Ruse (the defendant Roblin did not apply) obtained an order calling on the plaintiff to shew cause why the verdict (judgment) entered herein for the plaintiff against defendant Ruse should not be set aside, and judgment entered for him dismissing the plaintiff's action against him, the said verdict being contrary to law and evidence, and the weight of evidence.

In the same Sittings, May 30th 1888, *Bigelow* supported the motion.

Judgment.

STREET, J.

Argument.

Macgregor, contra.

The authorities referred to sufficiently appear in the judgments.

December, 23, 1888. GALT, C.J.:—

The findings of the jury are in accordance with the evidence. The only ground of defence by Ruse is that he was not present when the assault was committed and the organ forcibly removed.

It was proved that he sent Roblin and two other persons to remove the organ, and that the defendant Roblin held the wife while the other men removed the organ.

The law appears to me to be well settled, that if a servant is employed by his master to perform a service, the master is responsible for what the servant does in the performance of his master's orders. Now, in the present case, Ruse admits that he sent these men to obtain the organ ; and it was proved, that to enable them to do so, Roblin, according to his own evidence, "called to Mr. McDowell, who had by this time arrived. Mr. Ellis was left in the waggon. I said, Mac, 'You had better get the organ out of the room.' I was occupied with her, principally defending myself." There had been a scuffle between Roblin and the wife owing to the manner in which Roblin had forced his way into the house.

Upon the authority of the cases cited by the learned Judge in his considered judgment, this rule should be discharged.

I should have thought it unnecessary to reserve this case but for the argument of Mr. Bigelow, that because Ruse is charged as a principal in this case, together with Roblin, and as it was proved he was not present when the trespass to the premises and the assault on the wife were committed, the verdict against him cannot be allowed to stand.

This objection appears to me to be met by sub-sec. 8 of sec. 16 of "The Judicature Act." As it has been found by the

jury that the defendant Ruse has been, I may say, the cause of the trespass which led to the assault, it is a matter of no consequence whether he should have been sued as a trespasser or as responsible for the act of his servant. The rule of law referred to simply enacts that :

The Court "shall have power to grant, and shall grant, either absolutely or on such reasonable terms and conditions as to them shall seem just, all such remedies whatsoever as any of the parties thereto may appear to be entitled to in respect of any and every legal or equitable claim properly brought forward by them respectively in such cause or matter; so that, as far as possible, all matters so in controversy, between the said parties respectively, may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters avoided."

Judgment.
GALT, C.J.

ROSE. J. :—

I agree that the motion fails.

As to the joint liability, I think there is no doubt. *Murphy v. Corporation of Ottawa*, 13 O. R. 334, cited by Mr. Bigelow, is not in his favor. The facts are essentially different, and the judgment must be read in the light of and confined to the facts.

It was not said in that case where a servant acting in the execution of his master's orders commits a trespass, the master cannot be sued jointly with the servant. It was said, at p. 341, as quoted by my learned brother MacMahon, that "the injury complained of was the wrongful act or omission of the *one master or the other*."

As to the liability of the master, I was much impressed with the way in which Mr. Bigelow illustrated the hardship to masters of holding the rule, here acted upon, to be good law ; but I fear the law is too well settled to be now questioned.

As put by the Chief Baron in *Bayley v. Manchester, Sheffield, and Lincolnshire R. W. Co.*, in Ex. Ch., L. R.

Judgment. 8 C. P. 148, at p. 152: "The principle to be deduced from the authorities on this subject is, that where a servant is acting within the scope of his employment, and in so acting does something negligent or wrongful, the employer is liable even though the acts done may be the very reverse of that which the servant was actually directed to do."

ROSE, J.

It cannot be argued that in going for or taking away the instrument the servant here was not acting within the scope of his master's employment.

MACMAHON, J. :—

The statement of claim alleges : 1. A trespass in entering the plaintiff's house in Toronto by the defendants on the 30th of November, 1886 ; and 2. An assault by the defendants on the plaintiff's wife on the same day, whereby she was injured and bruised.

The plaintiff's son, Charles L. Ferguson, had purchased from the defendant Ruse an organ on the 31st of July, 1886, for \$120, payable by 26 monthly instalments of \$5 each, a hire-receipt being given by C. L. Ferguson, showing that the property in the organ was to remain in Ruse until the whole of the instalments had been paid.

The hire-receipt contained a provision that "In case of default in the punctual payment of the said monthly rental or the due fulfilment of any of the aforesaid agreements or conditions, the said Joseph Ruse may resume possession of the said organ, which I agree to deliver to him when required. And the said Joseph Ruse, or his agents or assigns, shall have full right and liberty to enter any house or premises where the said organ may be, and remove the same without resorting to any legal process."

The organ was sent by Ruse to the plaintiff's house, with whom the son, a youth under 21, was living, and where it remained until the 30th of November, when, no instalments having been paid, Ruse sent the defendant Roblin (who was then in his employment as book-keeper)

and two assistants to the plaintiff's house to remove the organ.

Judgment.
MACMAHON,
J.

Roblin took with him the hire-receipt as his authority to take possession of and remove the organ. The plaintiff and his son were absent when Roblin reached the plaintiff's house between 7 and 8 o'clock in the morning; and upon Roblin reaching the outer door entering to the hall, he opened it and entered the dwelling, but when he endeavoured to open the inner door or door to the parlour where the organ was, the plaintiff's wife resisted his entrance, when a scuffle ensued in which Mrs. Ferguson says she was much injured by Roblin.

The first point taken for the defendants during the argument was that there was a verdict against Roblin, the servant, and that a verdict against him and Ruse the master cannot stand together; and *Murphy v. Corporation of Ottawa*, 13 O. R. 334, was cited in support of this ground. But that case is no authority for the proposition endeavoured to be supported.

The action in that case was brought by the plaintiff to recover damages for herself and infant child for the death of her husband, caused, as she alleged, by the negligence of the defendants. There was judgment for the plaintiff against the defendant Doyle, and the plaintiff sought to have judgment entered against the corporation.

Armour, C.J., in giving judgment, at p. 341, says: "The action is founded upon the relationship of master and servant, and the wrongful act or omission, if such there was, which occasioned the injury complained of, was the wrongful act or omission of the one master, or the other, of Doyle or of the corporation, but not of both, and both cannot be held liable for it" to the plaintiff.

This is not an action by a servant against a master, but an action against both master and servant; and the right to retain a verdict against both is, I consider, concluded by the case of *Lumley v. Gye*, 2 E. & B. 216, where Erle, J., at p. 232, says: "It is clear that the procurement of a violation of a right is a cause of action in all instances

Judgment. where the violation is an actionable wrong, as in violations of a right to property, whether real or personal, or to personal security: he who procures the wrong is a joint wrongdoer, and may be sued either alone or jointly with the agent in the appropriate action for the wrong complained of."

MACMAHON,
J.

If therefore the defendant Roblin was acting in the prosecution of his master's business when he committed the trespass and assault for which this action is brought, then the plaintiff is entitled to retain his judgment against both the defendants.

The jury in answering the questions submitted to them by the learned Judge who tried the case, found that the defendant Ruse was not present when the organ was removed from the plaintiff's house, at which time the trespass and assault alleged in the statement of claim were committed by Roblin.

The learned Judge gave judgment against Ruse, the master, as well as against Roblin, the servant, upon the authority of *Bayley v. Manchester, Sheffield, and Lincolnshire R. W. Co.*, L. R. 7 C. P. 415, and L. R. 8 C. P. 148.

Roblin having been instructed by his master to obtain possession of the organ, assumed that he had the right to enter the plaintiff's premises where the organ then was and, if necessary, remove the instrument by force; for it was while Mrs. Ferguson was endeavouring to prevent his entering the room where the organ was standing, that Roblin made the assault upon her which formed part of the plaintiff's cause of action.

In *Smith's Master and Servant*, 4th ed., 368, it is stated: "If an act of trespass, on the part of a servant, be the natural or necessary consequence of an act which the master ordered to be done, his master will be liable to an action of trespass."

The author of *Pollock on Torts*, at p. 77, summarizes and comments upon the case of *Bayley v. Manchester, Sheffield, and Lincolnshire R. W. Co.*, *supra*, as follows: "A porter whose duty is, among other things, to see that passen-

gers do not get into wrong trains or carriages (but not to remove them from a wrong carriage), asks a passenger who has just taken his seat where he is going. The passenger answers 'To Macclesfield.' The porter, thinking the passenger is in the wrong train, pulls him out; but the train was in fact going to Macclesfield, and the passenger was right. On these facts a jury may find that the porter was acting within his general authority so as to make the company liable. Here are both error and excess in the servant's action: error in supposing facts to exist which make it proper to use his authority (namely that the passenger has got into the wrong train); excess in the manner of executing his authority, even had the facts been as he supposed. But they do not exclude the master's liability."

Judgment.
MACMAHON,
J.

The present case is no doubt very near the line, and presents features not found in any of the cases to which we have been referred: and, as stated by Lord Coleridge, C.J., in *Rayner v. Mitchell*, 2 C.P.D. 357, at p. 359, in regard to this branch of the law: "It has always been a matter of extreme difficulty to apply the law to the ever-varying facts and circumstances which present themselves."

What I deduce from the cases is, that if the servant has been entrusted by the master with the performance of any duty, or the management of any business, and the servant, in the performance of the duty or management of the business, from an erroneous impression on his part as to the extent of the authority with which he has been entrusted exceeds such authority, and injury results, the master is liable to the person damnified by the servant's act.

In the case we are considering Ruse was aware that the organ was in the plaintiff's house, and that the assent of the plaintiff was necessary before entering to obtain possession of the instrument. Roblin, instead of asking permission to remove the organ, opened the outer door of the house, and when the plaintiff's wife endeavoured to bar his further progress, he assaulted her.

Roblin no doubt entertained an erroneous idea as to the extent of his authority when he entered the house to

Judgment. remove his master's property therefrom ; and he doubtless
MACMAHON, assumed, that being clothed with authority to so enter
J. and remove the property, he was entitled to overpower
any one who attempted to resist his entrance.

For the reasons stated, I think the plaintiff is entitled to retain his verdict, and the motion must therefore be dismissed with costs.

See judgment of Lord Chelmsford, in *Betts v. DeVitre*, L. R. 3 Ch. 441, at p. 442; *Austin v. Davis*, 7 A. R. 478; *Newman v. Jones*, 17 Q. B. D. 132; *McSorley v. Mayor &c., of St. Johns*, 6 S. C. R. 531; *Charleston v. London Tramway Co.*, 4 T. L. R. 629.

Order discharged with costs.

[COMMON PLEAS DIVISION.]

BLAKE V. THE CANADIAN PACIFIC RAILWAY COMPANY.

Railways—Negligence—Ringing bell or sounding whistle—Negligence—Contributory negligence.

Action against defendants for an injury sustained by plaintiff being run over by defendants' train at a highway crossing, caused, as alleged, by the omission to ring the bell or sound the whistle. The persons in charge of the train swore that the whistle was sounded in compliance with the statutory requirements. The plaintiff said he heard a whistle which he thought came from a round house near by, but which might have been from the approaching train, and though the plaintiff's witnesses stated they did not hear the whistle it was quite consistent with their evidence that the whistle was sounded. The plaintiff, as he approached the track, looked to the north west for shunting engines, which he knew were going backwards and forwards all the time, and so did not look to the southwest, being the direction in which the train was approaching, and if he had been looking he would have seen the train and the accident would have been avoided. A person following immediately behind plaintiff, saw the train and stopped his waggon.

Per ROSE and MACMAHON, J.J. No negligence on defendant's part was proved, for it could not be held on the evidence that the whistle was not sounded as required.

Per GALT, C.J. There was contributory negligence on the plaintiff's part in approaching the crossing in not looking in the direction of the approaching train.

Per ROSE, J. The mere fact of plaintiff not looking in that direction was not, under the circumstances, evidence of contributory negligence.

THIS action was tried before FALCONBRIDGE, J., and a jury, Statement.
at Toronto, at the Fall Assizes of 1888.

The plaintiff complained that he was injured in crossing the line of the defendants at a place called Kate street, in West Toronto Junction, by a train of the defendants; and alleged that the accident was occasioned by the neglect of the defendants to ring the bell or sound the whistle, or in any other way warn the plaintiff of the approach of the train.

The defendants denied the allegations contained in the statement of claim; and alleged that the accident was owing to the contributory negligence of the plaintiff.

The persons in charge of the train swore that the whistle was sounded in compliance with the statutory requirements.

Statement.

At the close of the case the counsel for defendants moved to dismiss the action on the ground that the evidence shewed no cause of action.

The case had been already before a jury who had disagreed; and the learned Judge was of opinion that in order to avoid further litigation, it was expedient to take the findings of the jury. He therefore submitted the following questions:

"1. Did the persons on the train ring the bell or sound the whistle eighty rods west of the Kate street crossing, and keep the same ringing or sounding at short intervals up to the time of the accident? No.

2. Was the plaintiff immediately before and up to the time of the accident, driving with proper care in approaching the crossing? Yes.

3. Could the plaintiff by the exercise of proper care on his part have avoided the collision? No."

On these answers being returned, the learned Judge gave judgment in favor of the plaintiff.

In Michaelmas Sittings, 1889, the defendants moved for a new trial or for judgment in their favor, on the ground that the verdict was contrary to law and evidence; and that the plaintiff was guilty of such contributory negligence as disentitled him to succeed.

In Hilary Sittings, 1889, *G. T. Blackstock* supported the motion. *Dr. Snelling*, contra, referred to *Peart v. Grand Trunk R. W. Co.*, 10 A. R. 191; *Beckett v. Grand Trunk R. W. Co.*, 8 O. R. 601, 13 A. R. 174.

March 8, 1889. GALT, C. J. :—

The answers of the jury are contrary to the evidence, and if it was necessary there should be a new trial; but the undisputed testimony given by the plaintiff himself and a witness named O'Brien, brings the case, in my opinion within the decision of the Court of Appeal in *Weir v. Canadian Pacific R. W. Co.*, 16 A. R. 100. The facts are very similar. I refer to the following extract:

"Q. When you left Raglan did you think about the train? A. No. Q. Did you think about the train between the time you left Raglan and the time of the accident? A. No. Q. You were not looking out for bells? A. Well, I knew I was going near a train. Q. Could you see the headlight? A. Couldn't see anything; it was a beautiful night. Q. Moonlight? A. Yes. Q. Did you see the headlight, the glare of it shining? A. I couldn't say; that's not what startled me. Q. Can you say whether you saw that or not? A. No, I would not say anything about that; I would say I never saw it. Q. The first thing you knew was a crash? A. The first thing I knew was a little timidity, and I said "whoa," and I thought I would make a gallant escape. Q. What caused the little timidity? A. It was the suddenness of the approach, and I thought I would clear myself, if possible. Q. And you instinctively yelled "whoa," and pulled the horses back? A. Yes. Q. Up to that time you did not turn your head? A. Oh, yes I did; what's the use of talking that way? The first I knew the horses were on the track; I looked around and saw this engine right upon me. Q. Had you looked before that? A. No, I hadn't; I never saw it before, nor never had any cause to look. Q. Were you singing as you went along, whistling? A. I was humming. Q. Humming a tune to yourself? A. Yes. Q. Were the horses going on a walk or a trot? A. Walking; they were right on the approach. Q. Was the waggon on the track at all, the fore wheel of the waggon, did it go as far as the iron rail? A. I don't think it did; no. Q. Do you think either of the horses stepped over the iron rail? A. They were both on the track. Q. Does that mean that their front feet had stepped across the iron rail? A. Yes, but that was as far as they went."

Judgment.

GALT, C.J.

Upon this evidence the Court of Appeal gave judgment, dismissing the plaintiff's action, on the ground of contributory negligence on the part of the plaintiff.

The evidence of the plaintiff in present case bearing on the question of contributory negligence is:

"Q. Do you remember the 24th November last? A. Yes. Q. What were you doing on that day? A. I started to take a load of brick to Heintzman's piano factory. Q. At what hour of the morning would this be? A. Well, it would be between 8 and 9 o'clock. Q. What is the distance from the point where you turned out on Keele street to the first track of the railway? A. About 100 feet. Q. What happened when you came to the track? A. Well, when I got right up on the track I saw this train coming on me; the horses were on about it; the front wheel was coming up on to the first track, but the horses were over." (The collision then took place.) "Q. Now, where were your horses with reference to the tracks when you looked up and saw the train? A. The front wheel was coming up on the first track on to the switch. Q. Then your horses were on the track? A. The horses were on the main track. Q.

Judgment. Before you looked? A. Before I looked. Q. There is no doubt about that? A. No, sir. Q. Why did you not look up the track? A. Because I was driving across the road to home, and minding my own business. Q. Was there any reason, had you any motive for not doing so, was it carelessness, or what? A. No, I was attending to my work, you know; that is right, ain't it? Q. You were attending to your own business, and did not think of the train? A. I did not see it. Q. Did not think of it? A. No."

GALT, C.J.

The witness O'Brien stated that he was about five or six feet behind the plaintiff: that when he was twenty-five feet back from the switch, he saw the train and stopped his horse. He also testifies that the plaintiff was looking to the east, and as he was coming to the track the train came from the west.

Now, if the witness saw the train as he approached the crossing in rear of the plaintiff, it is manifest that, had the plaintiff taken the slightest precaution this accident would not have happened.

Upon the authority of *Weir v. Canadian Pacific R. W. Co.*, judgment should be given in favor of the defendants, dismissing the action.

As I have already stated, the answers are entirely opposed to the weight of evidence. It is a singular thing that in cases like the present, a jury appears to sympathize with the plaintiff without bearing in mind that the negligence of the plaintiff might be productive of most lamentable results, as in the case now under consideration, had the engine struck the horses in place of the waggon, the express train carrying numerous passengers, might have been wrecked and many lives lost through his culpable neglect.

The motion will be absolute to enter judgment for defendants, with costs.

ROSE, J. :—

Unless we are able to say as a matter of law that because on the admitted facts of this case, the fact of the plaintiff neglecting to look westward in the direction of the coming

train, disentitled him to recover, then the question of contributory negligence was properly left to the jury.

Judgment.

ROSE, J.

I do not understand that *Weir v. Canadian Pacific R. W. Co.*, lays down as law that if the bell is not rung nor the whistle sounded, and a collision happen, the company is relieved from the result of its negligence, merely because the plaintiff did not look before attempting to cross. If that were so, it would be in conflict with the doctrine laid down in *Peart v. Grand Trunk R. W. Co.*, 10 A. R., 191, as I understand that case.

The fact that the plaintiff did not look, is one for the Judge or jury, and may in view of surrounding facts be sufficiently patent to found upon it a finding of contributory negligence, or it may not.

In *Weir v. Canadian Pacific R. W. Co.*, 16 A. R. 100, the Court was dealing with a finding of fact by the Judge of the first instance; and, as I read the judgment, it is that the learned Judge upon the facts should have found contributory negligence.

Here the plaintiff said that having heard a whistle, he thought it came from the round house: that the reason he did not look up the track was, that he was looking toward the north west for the shunting engines: that they were going backward and forward all the time, day and night and that he was looking out for them.

If his attention was attracted by such engines, and thus for the moment he forgot about the possibility of a train coming from the west, and if the sounding of the bell or whistle would have awakened him to his peril, can it be said as a matter of law, that the accident did not result from the negligence, or that the plaintiff was guilty of such negligence as deprived him of the right to recover?

In my opinion the Legislature imposed upon the railway companies the duty of warning people who need warnings, and not merely the duty of going through a form not needed by those who are so alert as to take care of themselves.

But can it be said that there was evidence to go to the jury that the bell did not ring or the whistle sound?

Judgment.
ROSE, J.

The plaintiff admitted hearing a whistle, which, he said, might have been of the approaching train; but he thought it was from the round-house: that he could not tell if the whistle was being sounded at the time he was struck: that he did not hear a bell.

Thomas Travis was digging a foundation some 200 yards away, and did not hear any bell ringing before he saw the train, nor did he hear any whistle for some three or four minutes previous to the accident he could not say whether a bell was rung or whistle sounded after the accident.

On cross-examination he said he did not hear any whistle that morning before or after the accident; and admitted, what is patent, that his hearing depended upon his listening.

Charles Doyle, working with *Travis*, did not hear bell or whistle.

On cross-examination he stated: "I cannot swear that the whistle did not blow. Q. And if you missed the whistle you might have missed the bell? A. I might."

To *Dr. Snelling*—"Is it possible that a bell could have rung or a whistle sounded without your hearing it? A. It might have."

Thomas Crittenden, said he did not hear the bell ring; it might have rung, but the whistle blow must have drowned the bell ringing; he did not hear it.

"Q. Have you any reason to think it did ring? A. No I did not hear it; I heard the whistle blow; it blew at the time it struck him and after. Q. Loudly? A. Yes, pretty loudly."

On cross-examination—"Q. Then if *Blake*, *Travis* and *Doyle* did not hear the whistle blow before this man was struck it was not the fault of the whistle? A. If they did not hear the whistle first before the engine struck him they must have been deaf."

He stated that his mind was occupied as he was walking down the road, watching the men in front of him.

Dennis O'Brien did not hear a bell, but did hear a whistle when the train was some 30 or 40 yards from *Blake's* waggon; he did not hear the whistle *Blake* heard.

George Halford, laborer, did not hear the bell, but did hear the whistle just before the engine struck Mr. Blake.

Judgment.

Ross, J.

"Q. Now, if the bell had rung or the whistle had sounded some distance of time before the engine struck him, do you think you would have heard it? A. I can't say; that is the whistle I heard I speak of now."

On cross-examination—"Did not hear the whistle Blake heard. Q. You did not hear the whistle blow after the accident? A. I did not stop. Q. You were right there, you know? A. Yes."

This evidence amounts to this: Blake, the plaintiff, heard a whistle just as he turned out of the yard on to Keele street, which might have been that of the approaching train. No other of his witnesses heard that whistle. Travis and Doyle did not hear the whistle just before the accident, and the other witnesses did.

Travis did not hear any whistle at all, nor did Doyle who was working with him; but Doyle said both bell and whistle might have sounded and he not hear it.

Crittenden's mind was occupied; in other words he was not paying attention.

In face of the positive testimony given by the defence a finding of fact that neither bell rang or whistle sounded cannot possibly be sustained.

Nor, in my opinion, could it be sustained on such evidence if repeated on a new trial; and this, therefore, is a ground for not granting a new trial; and it becomes the duty of this Court to interfere and enter judgment for the defendant company, and not send the case down again and again until a jury can be found which will render a verdict according to the evidence.

On the argument I thought the fact that there was no direct finding that the injury resulted from the defendants' negligence would prevent retention of the judgment.

Upon further consideration, I am not so sure that the findings may not cover the ground, although only by inference or deduction; but in my judgment, such question should be put specifically, as a jury might have difficulty in find-

Judgment.

ROSE, J.

ing that the plaintiff was guilty of contributory negligence, and yet quite unable to find that if the statutory precautions had been observed, they would have prevented the accident.

In some cases the result is inevitable accident. In such a case there may be both negligence and want of contributory negligence, and yet the plaintiff not be entitled to recover. In other words the accident would have occurred even if there had been no negligence, and therefore the negligence was not the cause of the accident. Other cases might be instanced.

For these reasons I agree that the motion must be made absolute to enter judgment for the defendant company, dismissing the plaintiff's action with costs.

MACMAHON, J. :—

There was no sufficient evidence submitted to the jury upon which the finding of negligence against the defendants of not ringing the bell or blowing the whistle should be allowed to stand. In fact the evidence that the defendant's had complied with the statutory requirements in that regard was of the clearest character.

Without expressing any opinion on the other questions discussed by His Lordship the Chief Justice and my brother Rose, I think the order must be made absolute in the terms stated by the other members of the Court.

Order absolute.

[COMMON PLEAS DIVISION.]

REGINA V. READ.

General Sessions—Appeal to against conviction—Adjournment to following sessions—Endorsement on conviction—Necessity for.

An appeal from a conviction for malicious injury to property came on for hearing at the General Sessions. No order of adjournment was endorsed on the conviction the clerk merely entering a minute of the order in his book. At the following sessions the appeal was heard and the conviction quashed.

Held, that the provision in sec. 77 of R. S. C. ch. 178, as to endorsing the order of adjournment on the conviction was not imperative, but directory merely, and therefore the omission to make the endorsement did not affect the validity of the order to quash.

In Hilary Sittings *McKenzie*, Q.C., obtained an order ^{Statement.} nisi to quash an order made at the General Sessions of the Peace in and for the county of Brant, to quash a conviction of the above defendant for malicious injury to property.

The ground was that there was no order endorsed on the conviction or order, as required by sec. 77 sub-sec. (e) of R. S. C. ch. 178, which provides that "This Court shall have power, if necessary, from time to time, by order endorsed on the conviction or order, to adjourn the hearing of the appeal from one sittings to another or others, of the same Court."

The matter came on for hearing at the December Sessions, 1887, but as the jury had been discharged, and the respondent objecting to the appeal being proceeded with without a jury, it was adjourned until the June Sessions, the clerk entering a minute of the order in his book.

On the 13th of June following the appeal was again brought on, counsel for both parties being present. A jury was empannelled, witnesses sworn and examined, when the jury was discharged by the learned Judge; and the conviction quashed without costs by order of the Judge.

No order of adjournment was endorsed on the conviction.

In Hilary Sittings, February 6, 1889, *V. McKenzie*, Q.C. supported the motion, and referred to *Re McCumber and*

Argument.

Doyle, 26 U. C. R. 516 ; R. S. C. ch. 178, sec. 77, sub-sec. (e) ; *Addison on Torts*, Am. ed., (1876), vol. ii. sec. 960, p. 172 ; *Rex v. West Torrington*, Burr. S. C. 293 ; *Morgan v. Edwards*, 29 L. J. N. S. M. C. 108 ; *Regina v. French*, 13 O. R. 80 ; *Regina v. Belton*, 11 Q. B. 379 ; *Maxwell on Statutes*, 2nd ed., 450 *et seq.*

No one appeared to shew cause.

March 8, 1889. ROSE, J.:—

In *McCumber and Doyle*, 26 U. C. R. 516, it was decided that there was no power to adjourn the hearing of such an appeal. The statute was amended by 33 Vic. ch. 27, sec. 1, (D) giving such power in the language above quoted.

It is clear that the object of the Legislature was to give the power to adjourn. The entry of the order was a matter of procedure merely. The conviction or order being the record, it was convenient that on it should be endorsed the evidence of the order to adjourn. The object of the Legislature certainly would not be defeated by the omission of the endorsement. It seems to me it would be defeated if we held that such omission rendered the order void.

The cases and rules as to when directions in a statute are directory or imperative are collected in *Maxwell on Statutes*, 2nd ed., commencing at p. 450. At p. 452 he says: "But when a public duty is imposed, and the statute requires that it shall be performed in a certain manner, or within a certain time, or under specified conditions, such prescriptions may well be regarded as intended to be directory only, when injustice or inconvenience to others who have no control over those exercising the duty, would result, if such requirements were essential and imperative."

See also p. 460, where it is noted that "the 13 Hen. IV. ch. 7, which required justices to try rioters 'within a month' after the riot, was held not to limit the authority of the justices to that space of time, but only to render them liable to a penalty for neglect."

At p. 462: "It is no impediment to this construction, that there is no remedy for non-compliance with the direction. The Act of 2 Hen. V., which requires justices to hold their sessions in the first week after Michaelmas, Epiphany, Easter, and the translation of St. Thomas the Martyr, has always been held to be merely directory. So, the 6 Rich. II. ch. 5, which requires the justices to hold their sessions in the principal towns of their county, was held to be directory, not coercive. And yet it would be difficult to say that there would be any remedy against justices for appointing their sessions on other days or places than those prescribed by the statute."

Judgment.
Rose, J.

The learned author refers to the decisions supporting his text.

Here there was an order to adjourn spoken, entered in the clerk's book, acted upon, and at the adjourned hearing the defendant was relieved from the convicting order. It is needless to stay to point out the great hardship and inconvenience, if we should hold that there had in law been no adjournment, and that the order was invalid.

The result would have been the same had the facts been submitted to the jury, and had there been a finding by the jury on the merits.

I am not in doubt in expressing an opinion that the direction to have the order of adjournment endorsed on the conviction is not imperative, but merely directory, and that the omission to endorse it does not affect the validity of the order.

The order *nisi* will be discharged, but without costs, as no cause was shewn.

GALT, C.J., and MACMAHON, J., concurred.

Order nisi discharged.

[COMMON PLEAS DIVISION.]

REGINA V. EDGAR.

Canada Temperance Act—Conviction without trial and in defendant's absence.

The defendant, who was summoned to appear before the police magistrate on April 14th at F. for unlawfully selling liquor contrary to the Canada Temperance Act, instructed C. to go to W., where the police magistrate resided, to try and arrange the matter by paying such sums as should be demanded by the magistrate. On April 13th C. went to W. and settled the case by paying \$50, and at the same time C., without authority and without the paper having been read to him, signed in defendant's name, as his agent, an endorsement on the information, which stated that the information had been read over to the defendant who pleaded guilty to the same. On April 14th the police magistrate at W., without holding any court or calling any witnesses in support of the charge, and without defendant being present, convicted him of the offence charged, and fined him \$50 and costs, drawing up a formal conviction, which was returned. Subsequently he returned another conviction for the same offence, reciting that the conviction was made on April 14th at F. by defendant admitting the charge.

Held, that under the circumstances the conviction could not be supported, and must be quashed.

Statement. THIS was a motion to make absolute an order *nisi* to quash two convictions made against the defendant for the same offence—namely, a violation of the second part of the Canada Temperance Act, by Mr. S. Campbell, police magistrate for the county of Lambton.

In Hilary Sittings, 1889, *Aylesworth*, supported the order. *Delamere*, contra.

March 8th, 1889. MACMAHON, J. :—

The summons served upon the defendant charged him with having between the 8th of March and the 8th of April, 1887, at Forest, in the county of Lambton, unlawfully sold intoxicating liquor, contrary to the said Act; and required him to appear on the 14th of April at 10.30 at the council chamber in the village of Forest, to answer to the said charge.

The defendant in his affidavit filed upon obtaining the *certiorari*, states that he is proprietor of the principal commercial hotel in Forest, and being anxious to prevent several witnesses subpoenaed in the case being compelled to attend the magistrate's court, he, on the 13th of April, instructed Robert Craig, who was then in his employ, and was one of the parties summoned as a witness, to go to Watford, where the police magistrate resides, and try to arrange the matter with him so as to avoid a trial or the recording of a conviction by paying to such police magistrate such sum as he should demand. And that he gave no authority to Craig, either written or verbal, to sign anything on his behalf in connection with the case.

Judgment.
MACMAHON,
 J.

The defendant's affidavit also states that on the 14th of April the police magistrate was not in the village of Forest, nor did he open or hold any court on that or any other day for the trial of the said alleged offence.

The affidavit of the said Robert Craig states that in accordance with instructions received from the defendant he went to Watford on the 13th of April and saw the police magistrate, and asked him how much it would take to settle Edgar's case; and he replied \$55, which he paid, and the magistrate gave him a receipt therefor, which is annexed to the affidavit. He states the magistrate asked him to sign a paper, which he did, but without reading the paper to him, nor did he (Craig) read the paper himself, nor had he any knowledge of its contents. He also states that the defendant gave him no authority to sign any papers on his behalf.

What Craig signed is indorsed on the information; and is as follows:

"The within information and complaint having been read to me by Mr. S. Campbell, Police Magistrate for the county of Lambton, I therefore plead guilty to the same and any further proceedings that I may have in respect of said offence.

"J. E. EDGAR,

"Per ROBERT CRAIG.

"Witness, H. J. BURNAY.

"WATFORD, April 13. 1887."

Judgment.

MACMAHON,
J.

The Police Magistrate, on the 14th of April, at Watford, without holding any Court, without any witnesses being called in support of the charge, and without the defendant being present, proceeded to convict the defendant of the offence charged, and fined him \$50 and \$5 costs, drawing up a formal conviction, which was returned to and filed in the office of the clerk of the peace on the same day.

The Police Magistrate afterwards returned another conviction for the same offence, which was filed with the clerk of the peace on the 5th of October, in which it is recited that the conviction was made on the 14th of April at the village of Forest by the defendant's "admitting the charge and voluntary act he is convicted."

As already stated there was no court held for the trial of the cause, and the defendant was not present at the hearing of any cause in person or by attorney so as to make any admission of guilt; and, under the circumstances, there could be no conviction for the offence charged.

The order *nisi* must be absolute to quash the convictions, but without costs. There will be the usual order for protection to the magistrate.

GALT, C.J., concurred.

ROSE, J. was not present at the argument, and took no part in the judgment.

[COMMON PLEAS DIVISION.]

LAMPMAN V. THE CORPORATION OF THE TOWNSHIP OF
GAINSBOROUGH.

Negligence—Action under R. S. O. ch. 135—Action within six months by person beneficially entitled through death of intestate.

An action for damages, by reason of the death of a person, can be maintained under R. S. O. ch. 135, sec. 7, by the person beneficially entitled, though brought within six calendar months from the death, unless there be at the time an executor or administrator of the deceased.

THIS action as originally instituted, was by Amos ^{Statement.} Jesse Lampman, suing on behalf of himself and all heirs of the late Robert Lampman, deceased.

The claim was, that on the 10th February, 1887, and previous thereto, the defendants negligently allowed a certain highway passing through the said township, to become and remain out of repair, and dangerous for travel; and that the plaintiff's father, on said 10th February, while driving on said highway, was, by reason of such want of repair and negligence of the defendants, thrown from his waggon and killed; by reason of which the plaintiff sustained damage; and he claimed \$5,000.

It appeared that no administration had been taken out to the estate of the deceased.

The defences were:

1. Not guilty.
2. Contributory negligence on the part of Robert Lampman; and
3. That Robert Lampman was not killed in consequence of the alleged accident, but died a natural death, and the defendants in no way contributed to it.

After issue was joined, on an application made by Samuel Lampman, Abraham Lampman, and Mary Carrie, three of the heirs of Robert Lampman refusing to become co-plaintiffs, were barred from all interest in the action; and Magdalena Lampman, widow of the said Robert Lampman, and Michael Lampman, Robert Lampman, the

Statement. younger, and Joseph Wellington Lampman, three of the children of the said Robert Lampman, were added co-plaintiffs with the said Amos Jesse Lampman.

The cause was tried before Rose, J. and a jury at Welland, at the Spring Assizes of 1888.

It was objected that the plaintiffs were not entitled to maintain the action, on the grounds stated in the judgment, which were overruled.

In answer to questions put to them the jury found all the issues in favor of the plaintiff; and as to what pecuniary loss or damage has been sustained by: (1.) Amos Jesse Lampman, son of the deceased. (2.) Magdalene Lampman the widow. (3.) Robert Lampman, son of the deceased. (4.) Joseph Wellington Lampman, son of the deceased? The jury found that "The pecuniary loss or damage that has been sustained by Amos Jesse Lampman, 0. Magdalene Lampman, \$300. Robert Lampman, 0. Joseph Wellington Lampman, 0.

Judgment was directed to be entered by the learned Judge for the plaintiff Magdalene Lampman for \$300, with costs, and for the defendant corporation dismissing the action as against the remaining plaintiffs without costs.

In Michaelmas Sittings, 1888, a motion was made on behalf of the defendants to set aside the judgment for the plaintiff, and to enter judgment for the defendants, on the ground among others mentioned in the judgment.

During the same Sittings, November 27, 1888, *J. K. Kerr*, Q. C. and *Aylesworth* supported the motion.

German, contra, referred to *Hollerun v. Bagnell*, 4 L. R. Ir. (1879) 740.

December 23rd, 1888. MACMAHON J.:—

The first ground of the defendants' motion is, that the cause of action if any, was in the executor or administrator of Robert Lampman, and that the plaintiffs are not entitled to maintain the action until after the expiration of six months, within which the said executor or administrator might bring such action; and that Lampman having died on the 9th of February, and the action commenced on

the 10th of May, was, as far as these plaintiffs are concerned, commenced too soon.

Judgment.

MACMAHON,
J.

The 7th sec. of the R. S. O. ch. 135 follows the Imperial Act 27 & 28 Vic. ch. 95, sec. 1, which forms an amendment to Lord Campbell's Act; and the effect of the amendment was judicially considered in Ireland in the case of *Holleran v. Bagnell*, 4 L. R. Ir. 740, (1879) the head note to which is: "An action under the 27 & 28 Vic. ch. 95, (the Act amending Lord Campbell's Act), can be sustained by a relative of the deceased though brought within six calendar months from the death, unless there be at the time an executor or administrator of the deceased."

As tersely pointed out by Morris, C. J., in giving judgment at p. 741, the first section of the Act presents two alternatives: "(1) In case 'there shall be no executor or administrator of the person deceased,' or (2) 'that there being such executor or administrator, no such action as in the said Act mentioned shall, within six calendar months after the death of such deceased person as therein mentioned, have been brought by and for in the name of his or her executor or administrator, then and in every such case such action may be brought by and in the name of the person therein mentioned.'"

The motion must be dismissed with costs.

[The other grounds taken were on the evidence, and are not reported.]

GALT, C. J., concurred.

ROSE, J. was not present at the argument, and took no part in the judgment.

[COMMON PLEAS DIVISION.]

REGINA V. MABEE.

Canada Temperance Act—Absence of defendant—Service on wife—Evidence of lapse of reasonable time between service and hearing.

A summons was issued for selling liquor contrary to the Canada Temperance Act, which was served by leaving it with defendant's wife at his hotel. The defendant not appearing at the time and place mentioned in the summons for the hearing, and on the constable proving on oath the manner in which the summons had been served, the Police Magistrate proceeded *ex parte* to hear and determine the case and convicted defendant of the offence charged, and imposed a fine. At the time of the service of the summons the defendant was absent in the States as a witness at a trial there, and there was no evidence that his wife was informed by the constable of the purport of the summons, while defendant stated that he knew nothing of the matter until four or five days after the conviction had been made, when he received a letter from his wife stating that some magistrate's papers had been left for him at the hotel.

Held, that under sec. 39 of R. S. C. ch. 178, there must in such cases be evidence before the magistrate that a reasonable time has elapsed between the service of the summons and the day appointed for the hearing, and there being no such evidence here, the magistrate acted without jurisdiction and the conviction must be quashed.

Regina v. Ryan, 10 O. R. 254, overruled.

Statement.

THE defendant Pelham Mabee was convicted by Matthew C. Brown, Police Magistrate for the county of Norfolk, for that he did on the 16th day of March, 1888, sell intoxicating liquors in violation of the second part of the Canada Temperance Act; and this being his second offence against that Act, Mabee was fined \$100 and costs.

In Easter Sittings, 1888, *Barber*, for the defendant, obtained a writ of *certiorari* to bring up the conviction and other proceedings; and upon the return thereof obtained an order *nisi* calling upon the magistrate and complainant to shew cause why the said conviction should not be quashed with costs, on the ground : That said Mabee was not served with summons or information, and was not present at the hearing of the complaint; and that the magistrate had no jurisdiction to make the said conviction; and that the same was bad in law.

In Michaelmas Sittings, November 20, 1888, *Barber* Argument supported the order *nisi*.

Langton, contra.

The following cases were referred to: *Regina v. Ryan*, 10 O. R. 254; *Regina v. McAulay*, 14 O. R. 643; *Watt v. Barnett*, 3 Q. B. D. 183, 363; *Re Williams*, 21 L. J. N. S. M. C. 46.

March 8, 1889. MACMAHON, J. :—

The summons was issued on the 17th of March, 1888, calling upon the defendant to appear on the 22nd of that month; and the evidence of the constable who had the summons for service shews that he left a copy thereof with the defendant's wife at the hotel owned by the defendant on the morning of the 20th of March.

As the defendant did not appear in obedience to the summons at the time and place appointed for hearing the complaint against him, the magistrate, on the constable declaring upon oath the manner in which the summons had been served, proceeded *ex parte* to hear and determine the case, and convicted him of the offence charged, imposing the fine already stated.

B. Clarke gave the following evidence in regard to the service of the summons: "I am a constable of this county. I had a summons to Pelham Mabée, the defendant in this case. * * I left it with his wife at his hotel in Charlotteville Centre, in this county, on Tuesday the 20th day of March, 1888, at about 8.15 forenoon. It was a true copy of the summons shewn to me marked 'A.'"

The affidavit of the defendant, filed on the motion for the order *nisi*, states that he left home on the 19th of March for Detroit, in the State of Michigan, to give evidence as a witness on the trial of an action to take place in that city, in which action his daughter was plaintiff; that he reached Detroit on the 20th of March, and, after being there a week, he received a letter from his wife

Judgment. stating that some magistrate's papers had been left for him
MACMAHON, at his hotel, which, he says, is the first intimation he had
J. of any charge having been brought against him.

By R. S. C. ch. 178, sec. 14: "Every such summons shall be served by a constable or other peace officer, or other person to whom the same is delivered, upon the person to whom it is directed, by delivering the same to such person personally, or by leaving it with some person for him at his last or most usual place of abode."

Under the 17th section of that Act: "If the person served with a summons does not appear before the justice at the time and place mentioned in the summons, and it is made to appear to the justice, by oath * * that the summons was duly served a reasonable time in the opinion of the justice before the time therein appointed for appearing to the same, the justice * * may, if he thinks fit, issue his warrant (C) to apprehend the person so summoned, and to bring him before such justice, or some other justice, * * to answer to the said information or complaint."

Under sec. 18, the justice may issue his warrant in the first instance for the apprehension of the person against whom the information has been laid.

By sec 39: "If on the day and at the place appointed by the summons for hearing and determining the complaint or information, the defendant against whom the same has been made or laid does not appear when called, the constable, or other person who served the defendant with the summons shall declare upon oath in what manner he served the summons; and if it appears to the satisfaction of the justice that such constable or other person duly served the summons a reasonable time before the time appointed for appearance, such justice may proceed *ex parte* to hear and determine the case in the absence of the defendant, as fully, effectually, to all intents and purposes as if the defendant had personally appeared in obedience to such summons; or the justice, upon the non-appearance of the defendant, may, if he thinks fit, issue his warrant in the manner herein directed, and

adjourn the hearing of the complaint or information until the defendant is apprehended."

Judgment.

MACMAHON,
J.

The above sec. 39 is a consolidation of sections 7 and 32 of 32 & 33 Vic. ch. 31 (D). And upon a comparison of the original sections with the section as consolidated, it will be seen that the consolidation puts an end to the anomaly existing between these sections 7 and 32, during the time the original Act was in force.

The exclusive use of the word "party" in sec. 7 in connection with the service and non-appearance, would seem to indicate that personal service was contemplated by that section; and yet before the justice could proceed *ex parte* to the hearing of the complaint, it must have been proved by oath, "that a summons was duly served upon the party a reasonable time before the time appointed for his appearance." While under sec. 32, if the defendant did not appear when called, the constable who served him with the summons, should declare upon oath in what manner he served the summons, (that is, personally or by leaving it with some person at his last or usual place of abode) then if the justice was satisfied the summons was duly served, he may proceed to hear and determine the case in the absence of the defendant. So that if there was a personal service of the summons effected on the "party," under sec. 7, the justice before proceeding *ex parte* to hear and determine the complaint must be satisfied "that a summons was duly served upon the party a reasonable time before the time appointed for his appearance." But under sec. 32, where the service may not have been a personal one, the justice might proceed and determine the case in the absence of the defendant without his having been satisfied as to the service being effected a reasonable time before the time appointed for the defendant's appearance.

Under sec. 39 of R. S. C. ch. 178, where the defendant does not appear at the time and place appointed by the summons, the justice must satisfy himself by the oath of the constable that the summons was duly served on the defen-

Judgment. dant a reasonable time before the time appointed for ap-
MACMAHON, pearance before proceeding *ex parte* to hear and determine
 J. the case.

The provision as to the mode of service of the summons in R. S. C. ch. 178, sec. 14, is the same in substance as in the Imperial Act, 11 & 12 Vic. ch. 43, sec. 1; and sec. 39 of our own Act contains almost the identical provision to be found in sec. 2 of the Imperial Act as to what is requisite to be proved to the justice, where the service of the summons has not been a personal service, before the justice can proceed *ex parte* to hear and determine the case in the absence of the defendant.

In *Regina v. Smith*, L. R. 10 Q. B. 604, secs. 1 and 2 of the Imperial Act, 11 & 12 Vic. ch. 43, were fully considered. The headnote to that case states: "The defendant was a fisherman, and went to sea in pursuit of his calling on the 9th of March. On the same day a summons for an assault was taken out against him, requiring him to appear and answer the charge upon the 12th. On that day, it having been proved that a summons was served on the defendant on the 10th by leaving it with his mother at his usual place of abode, the justices convicted him in his absence. Upon the 9th of April he returned from sea, and was arrested under the conviction:—

Held, that there was no evidence before the justices that a reasonable time had elapsed between the time of the service of the summons and the day for hearing the summons and the justices had therefore no jurisdiction to convict."

Cockburn, C. J., in giving judgment said, at p. 607: "To convict an accused person unheard is a dangerous exercise of power, there being an alternative mode of procedure by issuing a warrant to apprehend him. Justices ought to be very cautious how they proceed in the absence of a defendant, unless they have strong ground for believing that the summons has reached him, and that he is wilfully disobeying it. * * It does not appear that she" (the defendant's mother) "was informed what her son was thereby" (by

the summons) "required to do; if she had been informed of its purport she probable would have stated that her son was at sea." Judgment.
MACMAHON,
J.

Quain, J., said, "There are two modes of service pointed out by sec. 1, and if the service be otherwise than personal, the nature of the summons must be explained to the person with whom it is left."

There is no evidence in the present case that the defendant's wife was told of the purport of the summons; or, if so, she probably would have informed the constable that her husband was in Detroit attending Court as a witness, and would be absent for some days.

I have looked at *Ex p. Hopwood*, 15 Q. B. 121, and *Re Williams*, 21 L. J. N. S. M. C. 46; but I consider the later decision of *Regina v. Smith* is the proper rule to lay down for the guidance of justices under the circumstances appearing in this case. The attention of the justices was not brought to sec. 39 of the Act requiring a reasonable time to elapse between the service of the summons and the day for the defendant's appearance; and the evidence which should have been adduced, to shew that such reasonable time had elapsed, was not before the police magistrate; and he therefore acted without jurisdiction.

The rule will be absolute, but without costs. There will be the usual order for protection to the magistrate and constable.

ROSE, J. :—

I agree to what my learned brother MacMahon has said, although I came to the contrary conclusion in *Regina v. Ryan*, 10 O. R. 254.

In that case counsel for the Crown apparently conceded that the service had not been duly made, and that the language of sec. 7, 32 & 33 Vic. ch. 31, now part of sec. 39, R. S. C. ch. 178, i. e., "duly served upon the party," pointed to a personal service. Sec. 32 of 32 & 33 Vic. ch. 31, now sec. 39, of R. S. C. ch. 178, was not cited.

Judgment.

ROSE, J.

As pointed out by my learned brother, in the last revision the words "upon the party," have been dropped out, so that now there is no ground for the argument advanced in *Regina v. Ryan*.

But Mr. Langton by his clear and well delivered argument in this matter, convinced me that "service upon the party" in sec. 7, meant no more than the service required by sec. 2, i. e., service "upon the person to whom it is directed by delivering the same to the party personally or by leaving it with some person for him," &c.

If this is the correct view to take, then *Regina v. Ryan* was not well decided, and must be taken to be overruled by the decision in this case.

In this view I understand the other members of the Court concur.

See also *Regina v. McAuley*, 14 O. R. 643.

GALT, C. J., concurred.

Order absolute to quash conviction.

[COMMON PLEAS DIVISION.]

REGINA V. MURPHY.

*Gaming—Stock gambling—Summary conviction—51 Vic. ch. 42 (D.)—
R. S. C. ch. 158.*

The Act 51 Vic. ch. 42, sec. 1 (D.), makes it an indictable offence to make or authorize contracts by way of gaming or wagering on the rise or fall of stocks and merchandize, and to habitually frequent any office or place where such contracts are made. By sec. 3: The keepers of such places are to be held to be keepers of common gaming houses; the place of business to be a common gaming house, and the instruments used instruments of gaming, "the whole within the meaning of R. S. C. ch. 158, the Act respecting Gaming Houses, and shall be subject to all the provisions of the said Act." Sec. 6 of the R. S. C. ch. 158, enacts that persons playing or looking on while others are playing are guilty of an offence under the Act; and by sec. 9 authority is given to the police magistrate to try offences under the Act summarily. An information under R. S. C. ch. 158, charging the defendant and others with unlawfully playing in a common gaming house was heard before the police magistrate summarily and the defendant convicted. The evidence shewed that the defendant was merely in a place where it was alleged that contracts in violation of the 51 Vic. ch. 42, were made.

Held, that sec. 3 of 51 Vic. ch. 42 (D.) was not incorporated into secs. 4 and 6 of R. S. C. ch. 158 so as to cause the fact of a person being in office or place of business where such prohibited contracts were made equivalent to playing or looking on while others were playing in a common gaming house, and so punishable by summary conviction.

THIS was an order *nisi* calling on the police magistrate **Statement.** of the city of Toronto, and the informant, to shew cause why a certain conviction made by the said magistrate, whereby the said Murphy was convicted for unlawfully playing in a common gaming house, should not be quashed on the grounds: 1. That there was no evidence of any offence against the Act respecting gambling, R. S. C. ch. 158. 2. That there was no evidence given of the crime charged in the information under section 6, ch. 158; and the information having been laid under that Act, the conviction could not be supported by evidence given under another Act.

The information charged that the defendant and others "unlawfully were playing in a common gaming house;" and they were convicted of this offence.

Statement.

The evidence shewed that the defendant was merely in an office or in a place of business, where it was alleged the contracts prohibited by sec. 1 of 51 Vic. ch. 42 (D.), were made.

In Michaelmas Sittings, 1888, *McCarthy*, Q.C., and *W. S. Gordon*, supported the order.

Maclaren, contra.

December 5, 1888. GALT, C.J.—

By sec. 9 of the Act, R. S. C. ch. 158, the Police Magistrate had authority to try any offence against the provisions of the Act.

There was no evidence whatever to sustain the charge under that Act; but when the case came before the police magistrate, it was urged that, although the information was laid under R. S. C. ch. 158, the defendant was liable, because the evidence shewed a breach of ch. 42 of 51 Vic. (D.): "An Act respecting gaming in stocks and merchandize." The information was not for a breach of any of the provisions of that Act, for had it been so, the police magistrate would have had no authority to try the case.

When the case was before us, Mr. Maclaren argued that as the provisions respecting gaming houses and gambling were incorporated into the Act 51 Vic. ch. 42; the provisions of that Act were, by reference, incorporated into the Act ch. 158; but there is no such provision in the Act of 51 Vic.; and consequently this rule must be made absolute to quash the conviction.

There will be no costs; and there will be the usual order for the protection of the magistrate and inspector.

ROSE, J. :—

I agree. Chapter 42 of 51 Vic. (D.) makes it an indictable offence, (1) to make or authorize certain gaming contracts therein specified; (2) to habitually frequent any office

where such contracts are made. For such offences the penalties are provided, and provision is made as to the burden of proof.

Judgment.
Rose, J.

Then the Act provides: sec. 3, that keepers of places where such business is carried on shall be held to be keepers of common gaming houses; the place of business to be a common gaming house, and the instruments used, implements of gaming, "the whole within the meaning of" ch. 158, R. S. C., intituled "An Act respecting Gaming Houses," and "shall be subject to all the provisions of the said Act."

Exactly what these last words, *i. e.*, from "the whole" to the end, mean, it is, perhaps, difficult to say.

At the most they make applicable the provisions of ch. 158, to keepers of the places, and the places themselves where such gaming business is carried on, and to the instruments used therein.

But it is argued that they apply to persons found in such places, although not keepers, and to persons who look on while others are carrying on such gaming business or making such prohibited contracts so as to make such persons subject to the provisions of sections 4 and 6 of R. S. C. ch. 158.

It seems to me that to accede to such contention would be adding a new clause to ch. 42.

If it had been intended to make a person found in places where such business is being carried on, or looking on during its transaction, liable to prosecution under ch. 158, it would have been a simple thing to have expressed.

Express provision is made in 51 Vic. ch. 42, (D.), for punishing those making, authorizing, or aiding or abetting the making of the gaming contracts; and also for punishing habitual frequenters of the places where such business is being carried on. If it had been intended to punish the persons found in such places, or looking on while such business is being transacted, express words would no doubt have been used, and it would not have been left to inference.

It will also be observed that ch. 158 does not provide any penalty for being a keeper of a common gaming house, nor for having instruments of gaming.

Judgment.

ROSE, J.

Proceedings under ch. 158 may be taken against all persons found in gaming houses, and all instruments of gaming may be destroyed.

Under sec. 1 of that chapter gaming houses may be entered and all persons found therein arrested. Under sec. 5 such instruments may be destroyed; and under sec. 6 players and lookers on may be punished.

So that making the keepers of common gaming houses, the gaming houses and instruments of gaming under sec. 3 of ch. 42, subject to the provisions of ch. 158, does not incorporate or bring into play any penalty or clause of ch. 158. This conviction was under sec. 6 of ch. 158, which subjects to punishment persons playing or looking on; and such provisions are not applicable to keepers of common gaming houses as such, merely, and of course not to the houses or to instruments of gaming.

To accede to the argument for the prosecution, would in my opinion, be legislating.

It was urged upon us that ch. 42 did not apply to such a case as this as the stock alleged to be bought and sold, was in the United States, and the purchase and sale were to be made there.

It is not necessary to determine this question; but at present I am not impressed with its soundness. All that was to be done, *i. e.*, the payment of the margin and the receipt of the profit, if any, was to be done here. No stock was in fact to be bought or sold, and all that was to be done in the adjoining country, was to ascertain the rise and fall of the market. The Act was evidently aimed at just such transactions, and probably it will be found to be sufficient for such purpose.

I think there was ample evidence of a violation of the provisions of ch. 42, had the proceedings been taken under that Act.

I agree that the conviction must be quashed, but without costs; and, if required, the usual order for protection may go.

MACMAHON, J. :—

Judgment.

MACMAHON,
J.

The Act 51 Vic. ch. 42 (D.), was passed to prevent gaming and wagering on the rise and fall in the value of stocks and merchandise ; and to punish persons engaged in such gaming and wagering, as well as to prohibit and punish the opening and maintaining of places therefor, and the frequenting thereof.

Any person who makes or signs, or authorizes to be made, or signed any contract or pretended contract prohibited by sec. 1, sub-secs. (a) and (b), is guilty of a misdemeanour and liable to imprisonment for any term not exceeding five years, and to a fine not exceeding \$500.

Under sub-sec. 2 of sec. 1 : "Every one who habitually frequents any office or place wherein the making or signing, or procuring to be made or signed, or the negotiating or bargaining for the making or signing of such contracts of sale or purchase as aforesaid, is carried on, is guilty of a misdemeanour and liable to one year's imprisonment."

By sec. 3, every one who manages or maintains any office or place of business wherein such contracts of sale or purchase are entered into, "shall be held to be the keeper of a common gaming house, and such office or place of business shall be held to be a common gaming house, and the instruments used in such office or place of business for the conveyance of messages in respect of the purchase or sale, or pretended purchase or sale, of any such shares, goods, wares or merchandise, and the tablets, blackboards, slates, or other implements used * * shall be held to be implements of gaming, the whole within the meaning of ch. 158 of the R. S. C., intituled 'An Act respecting Gaming Houses,' and shall be subject to all the provisions of the said Act."

Under the 6th section of the Act respecting gaming houses, R. S. C. ch. 158, "Every one who plays or looks on while any other person is playing in a common gaming house is guilty of an offence, and liable, on summary conviction before two justices of the peace," to a fine, or, "in default of payment, to imprisonment."

Judgment
MACMAHON,
J.

The defendant was arrested in an office or place of business where it was alleged contracts were made and signed in contravention of 51 Vic. ch. 42 (D.), and he was charged with unlawfully playing in a common gaming house as if his presence in such office or place of business rendered him liable to summary conviction under the 6th sec. of ch. 158, above referred to.

The prosecution and conviction of the defendant proceeded on the assumption that sec. 3 of 51 Vic. ch. 42 (D) had been incorporated into secs. 4 and 6 of R. S. C. ch. 158; and that his being in an office or place of business where contracts were made in contravention of sec. 1 of the former Act, was equivalent to playing or looking on while others were playing in a common gaming house, and so punishable by summary conviction.

As I read the 51 Vic. ch. 42, offences against that Act are not punishable by summary conviction; and as the charge against the defendant purported to be an infraction of that Act the police magistrate had no jurisdiction; and the conviction of the defendant must therefore be quashed.

It is somewhat difficult to understand what is intended by the first part of sec. 3 of 51 Vic. ch. 42 by which a person who, either as principal or agent, occupies, uses, manages or maintains any office or place of business wherein he carries on or aids in carrying on the business of making or signing or procuring to be made or signed, or negotiating or bargaining for the making or signing of such contracts of sale or purchase, "shall be held to be the keeper of a common gaming house."

The language employed in that part of the section, if effect is to be given to the language itself, renders such a person an aider or abettor in the acts prohibited by sec. 1; and upon conviction liable to the penalties prescribed for offences against that section of the Act.

If I am correct in this interpretation of that part of sec. 3, I am at a loss as to what significance to attach to the words, "the whole within the meaning of R. S. C. ch. 158," used in the latter part of that section. For, as pointed

out in the judgment of my brother Rose, no provision is made by that Act for the punishment of keepers of gaming houses; and unless it was supposed that that class of persons were punishable under ch. 158, the bringing the first part of sec. 3 within that Act, would be meaningless.

Judgment.
MACMAHON.
J.

If the words: "the whole within the meaning of R. S. C. ch. 158," apply only to the office or place of business, being held a common gaming, house and the instruments, tablets, blackboards, slates or other implements used, being held to be implements of gaming within the meaning of ch. 158, that is quite intelligible. For by making such offices or places of business common gaming houses, and the instruments, tablets, &c., implements of gaming within ch. 158, the police are authorized to force an entrance into such offices and places of business, and confiscate such instruments, tablets, &c., and the magistrate may cause these to be destroyed as instruments of gaming.

Without expressing an opinion upon the point, whether the words, "the whole," &c., apply to the latter part of sec. 3, to which I have referred; and that such part only is brought within the meaning of R. S. C. ch. 158; or whether, as argued, these words, "the whole," &c., brings sec. 3 in its entirety within that Act, I do not see, even if I were to hold the latter view, how it would help the case of the prosecution.

Had the defendant been proceeded against for the misdemeanour mentioned in sub-sec. 2 of sec. 1, in order that he should be prosecuted to conviction, it would have been necessary to shew that he was an "habitual frequenter" of the office or place of business where the prohibited contracts were signed.

Conviction quashed.

[COMMON PLEAS DIVISION.]

REGINA V. WINEGARNER.

Coroner—Inquisition—Statement of holding inquest—Identification of body—Constable acting as juror and witness.

The caption to an inquisition finding the prisoners guilty of murder, stated that the inquest was held at H., etc., on the 11th and 15th days of January, in the 51st year of the reign of Her Majesty Queen Victoria, and the inquisition to be "an inquisition indented, taken for our sovereign lady the Queen," etc., "in view of the body of an infant child of A. W. (one of the prisoners) then and there lying, and upon the oath of" (giving the names of jurors) "good and lawful men of the county, and who being then and there duly sworn and charged to enquire for our said lady the Queen, when, where, how and by what means the said female child came to her death, do upon their oaths say," etc.

Held, that the statement of the time of holding the inquest was sufficient : that it sufficiently appeared that the presentment was under oath : and that it need not be under seal : that there was a sufficient finding of the place where the alleged murder was committed : and of identification of the child murdered with that of the body of which the view was had.

L., the constable to whom the coroner delivered the summons for the jury, was at the inquest sworn in as one of the jury, and was sworn and gave evidence as a witness ; and Y., a jurymen, was also sworn and gave evidence as a witness.

Held, that the fact of L. being such constable did not preclude him from being on the jury, nor did either of such positions preclude him giving evidence : and so also Y. was not precluded.

Statement.

In Hilary Sittings, 1889, an order *nisi* was obtained by A. S. Jones to quash a coroner's conviction finding the prisoners guilty of murder.

In the same sittings, A. S. Jones supported the motion, and referred to *Rex v. Ownsworth*, 2 Keeble 676 ; *Rex v. Evett*, 6 B. & C. 347, 251 ; Boys on Coroners, 2nd ed., 116, 120 ; *Regina v. Skeats*, 7 L. T. 433 ; Jervis on Coroners, 4th ed., 246 ; *Regina v. Golding*, 39 U. C. R. 259 ; *Regina v. Carter*, 34 L. T. N. S. 849.

Dymond, contra, referred to Boys on Coroners, 112, 174 ; Jervis on Coroners, 4th ed., 246, 249.

March 8, 1888. MACMAHON, J. :—

1. The first ground taken is that the said inquest is not shewn to have been properly adjourned or resumed.

The caption to the inquisition states that the inquest was held at Hatley, in the county of Brant, on the 11th and 15th days of January, in the 51st year of the reign of our sovereign lady Victoria.

Judgment.
MACMAHON,
J.

In *Regina v. Skeats*, 7 L. T. 433, the inquisition was stated to have been held on the 15th of June, and by adjournment on three succeeding days; but purported to have been signed and sealed on that day, so that it appears to have been executed before the termination of the inquiry, viz., on the 15th of June.

It was held that the inquisition, though in *fact* holden on different days, was in *law* holden on one day.

In *Jervis on Coroners*, 4th ed., p. 246, it is stated: "If there has been an adjournment it is better to set it out in the caption * * but it is sufficient to describe the inquisition as being held on the first day of the sitting."

2. The second ground is: That the presentment is not stated to be on oath, nor is it under seal.

In the caption the inquisition is stated to be upon the oath of twelve men, whose names as the jurors comprising the inquest are set out in full as "good and lawful men of the said county duly chosen, and who being then and there duly sworn," &c.; which is a complete answer to the first part of the second ground taken in the rule.

As to the latter part of the second ground Mr. Boys, in his work on *Coroners*, 2nd ed., at p. 151, says: "It appears there is no express authority requiring the inquisition to be sealed, but the practice of sealing is universal, and had better not be departed from."

Jervis on Coroners, 4th ed., p. 259, says: "It was formerly the practice for the coroner and the foreman of the jury only to sign the inquisition, but that practice has been decided to be erroneous." And at p. 260: "There seems, however, to be no express authority which makes the sealing absolutely necessary."

3. The third ground is: That there was no finding by the jury of any place where the alleged murder was committed.

Judgment.MACMAHON,
J.

The case of *Rea v. Evett*, 6 B. & C. 247, was referred to as showing that the place where the crime was committed should have been stated. Under the law as it existed at the time of that decision, (1827) it was as stated in the judgment of the Court, essential to state the place of the death and the finding of the body, in order to originate the jurisdiction of the coroner. But by R. S. C. ch. 174, sec. 104: "It shall not be necessary to state any venue in the body of any indictment; and the district, county or place named in the margin thereof, shall be venue for all the facts stated in the indictment." And by the same ch. sec. 2, sub-sec. (c.) "The expression, 'indictment,' includes information, inquisition, and presentment."

4. The fourth ground is: "That James S. Lee could not legally act at or upon said inquest (as he did) as constable, juror, and witness, or in any two of such capacities.

Lee was the constable to whom the coroner delivered the summons for service on the jury, and was himself sworn as one of the jury at the inquest.

There can, I conceive, be no valid objection to a constable serving as one of the jury on a coroner's inquest, although, if it can be avoided, it were preferable that he should not be sworn of the jury. It may be that in this case a sufficient number of jurors had been summoned by the constable to form the jury panel at the inquest; but the required number did not appear, and for that reason Lee was, as a tales juror, called to make up the required number.

By R. S. O. ch. 52, sec. 6, sub-sec. 14, constables are amongst those exempted from serving as either grand or petit jurors in any Court. But inquests held by coroners are expressly excepted from the operation of the Jurors Act R. S. O. ch. 52, sec. 138: Boys, p. 112.

A person because of his being sworn of the grand jury or upon a coroner's inquest, is not thereby exempted from being a witness if he is in possession of evidence relating in the one case to the charge mentioned in the indictment; or in the other to the death of the person upon view of whose body the inquisition is being held.

In *Anonymous*, 1 Salk. 405, it is thus stated : " If a jury give a verdict on their own knowledge, they ought to tell the Court so that they may be sworn in as witnesses; and the fair way is to tell the Court before they are sworn, that they have evidence to give." Judgment.
MACMAHON,
J.

And in Roscoe's Criminal Evidence, 10th ed., 130, it is stated : " A juror may give evidence of any fact material to be communicated in the course of a trial, but of course he must be sworn."

5. The fifth ground that James Yates, a juror, was not competent to act as a juror because he was sworn as a witness, and gave evidence upon the trial, is disposed of by what I have already said in regard to Lee.

6. The sixth ground taken is : " That there is no finding upon the oaths of twelve competent jurymen."

This ground is disposed of by the answer to the second ground of objection and by the answers given to the objections raised against Lee and Yates being competent to act as jurymen.

7. The seventh ground is : " That there is no sufficient identification of the child found to have been murdered with that of whose body the view was had."

The caption to the inquisition states it to be " An inquisition indented, taken for our sovereign lady the Queen * * on view of the body of a female infant child of Almina Winegarner " (one of the prisoners), " then and there lying dead, upon the oath of " (giving the names of the jurymen) " good and lawful men of the said county, duly chosen, and who being then and there duly sworn and charged to inquire for our said lady the Queen when, where, how, and by what means the said female child came to her death, do upon their oaths say, etc."

The body the jury viewed was that of the female infant child of Almina Winegarner; and it is for the murder of that female infant child of Almina Winegarner that the coroner's jury have found the prisoners guilty.

The eighth ground is disposed of by the answer to the first ground taken upon the return to the *certiorari*

Judgment. The depositions of the witnesses, the finding of the jury, and the signatures of the coroner and jury were all written in pencil, which is inexcusable carelessness on the part of one clothed with the important functions devolving upon a coroner.

MACMAHON,
J.

The order *nisi* must be dismissed, and the *certiorari* superseded.

GALT, C. J., concurred.

ROSE, J. was not present at the argument, and took no part in the judgment.

[COMMON PLEAS DIVISION.]

COLVIN V. MCKAY.

Defamation—Libel—Privilege—Excess of—Evidence of malice.

The plaintiff had been treasurer of the township of C. from 1882 to 1885, when by reason of the auditors' report, shewing that two sums of \$1,400 and \$132.32 were not accounted for by him, he was dismissed. A commissioner was appointed by the Lieutenant-Governor, who examined into the matter, and in December made his report stating that the \$1,400 item was a mistake of the auditors, and that, except as to the \$132.32, all the township moneys were accounted for. The commissioner subsequently attended a meeting of the council, at which defendant, who was a councillor, was present, and after examining plaintiff on oath informed the council that he was satisfied with plaintiff's explanation as to \$125 of this sum, namely, being interest on his own moneys deposited with the township funds; and he made an addition to his report to that effect. In February following the plaintiff wrote to a newspaper that he was ready to pay the township any moneys either the council, auditors, or commissioner could shew he owed, whereupon the defendant wrote to the paper, stating that the commissioner, apart from the mixing of moneys, had found plaintiff indebted in \$125, and also stating that plaintiff had made several thousand dollars out of the township, and could well afford to pay his shortage and still have some thousands to the good. In an action for libel.

Held, that the matter discussed in defendant's letter being one in which defendant was interested as a ratepayer and member of the council, there might be a qualified privilege, still it was for the jury to say whether under the circumstances the language employed was within the privilege, or was in excess of what the occasion justified: and if in excess, they could properly draw inference of malice.

The jury having found for plaintiff the Court refused to interfere.

THIS was an action of libel tried at Walkerton on the 24th of March, 1888, before Falconbridge, J., and a jury, who found a verdict in favor of the plaintiff for \$265.25.

The evidence is fully set out in the judgment of the Argument Court.

In *Easter* sittings, 1888, the defendant moved to set aside the judgment entered for the plaintiff, and to enter judgment for the defendant, or for a new trial on grounds which sufficiently appear in the judgment.

In *Michaelmas* sittings, November 26, 1888, *McCarthy*, Q. C., supported the motion, and referred to *Todd v. Dun Wiman & Co.*, 15 A. R. 81; *Adams v. Coleridge*, 1 Times L. R. 84, 87; *Odger on Libel and Slander*, Black. Ed., 2nd Eng., 197, 271, 273; *Spill v. Maule*, L. R. 4 Ex. 232; *Turnbull v. Bird*, 2 F. & F. 524; *Hicks v. Faulkener*, 8 Q. B. D. 168; *Fairman v. Ives*, 5 B. & Al. 642; *Taylor v. Hawkins*, 16 Q. B. 308; *Delany v. Jones*, 4 Esp. 191; *Macdonell v. Robinson*, 8 O. R. 53, 12 A. R. 270; *Laughton v. Bishop of Sodor and Man*, L. R. 4 P. C. 495, 504-5; *Koenig v. Ritchie*, 3 F. & F. 413; *Kelly v. Tintling*, L. R. 1 Q. B. 699; *Lawless v. Anglo Egyptian Cotton Co.*, L. R. 4 Q. B. 262.

Lash, Q. C., contra, referred to *Odger on Libel and Slander*, p. 232, 3.

March 8, 1889, MACMAHON, J. :—

Before dealing with the question submitted on the argument for the consideration of the Court, it will be necessary to consider the relative position of the parties to the action, and also the events leading up to the publication by the defendant of the alleged libel.

The plaintiff had been from May, 1882, up to February, 1887, treasurer of the township of Culross, when, in consequence of attention having been called by the reports of the auditors for the years 1884, 1885, and 1886, to supposed discrepancies between the books of the plaintiff as township treasurer and the account in the bank in which the moneys were deposited, he was, in said month of February, 1887, by a resolution of the council, dismissed from office.

Judgment.
MACMAHON,
J.

By the auditors' report for the year 1884, which was presented to the township council early in the year 1885, there appeared as being in the bank to the credit of the township the sum of \$1,400, and in the plaintiff's hands as treasurer, \$133.32. The auditor's report for 1885, contained no reference to this \$1,400, which in the previous year had appeared as being to the township's credit in the bank; and the only amount carried forward to credit was the \$133.32. Also in the auditors' report for 1886, no reference is made to the \$1,400 item.

The sum of \$1,400 had been deposited by the plaintiff in the year 1884, in the Merchants' Bank to the credit of the township, and in some way that sum was debited twice to the plaintiff by the auditors; and by that means the report made the township creditors in the bank to that extent.

A number of the ratepayers of the township having petitioned therefor, the defendant, who was a member of the township council, moved a resolution, which was carried, that the council petition the Lieutenant-Governor to issue a commission to enquire into the state of the township finances during the time the plaintiff was treasurer.

The Lieutenant-Governor issued a commission appointing W. F. Munro a commissioner to make the enquiry desired by the township council, and to report the result. Mr. Munro went to Culross and investigated the treasurer's books, and inspected the accounts as kept by the plaintiff as treasurer in the bank; and, having prepared a draft report, he, on the 23rd of December, 1887, at the request of the township council, went to Culross and read his report to the council then in session.

The concluding portion of the report, and which formed, as it were, a rider to it, and was added after the plaintiff had been examined on oath by the commissioner in the presence of the members of the township council as to the question of interest on the deposits made in the bank, is the only part of the report necessary to refer to, and is as follows:

“ Having then fully considered all the points submitted for investigation, the result may be briefly stated as follows: The treasurer has accounted for all the sums of the municipality with the exception of the two items of interest referred to, the first amounting to \$125.90, the second for \$8.76. The first, as was shewn, is the difference between the total credit by the bank, and the total debit in cash. With regard to this item, the ex-treasurer appeared before the council at Teeswater on the 23rd instant, and, being duly sworn, deposed to the effect that the said item represents the interest which had accrued of funds of his own, and did not belong to the municipality. Assuming this to be the case, the conclusion is that the treasurer has accounted for all the funds of the municipality, with the exception of the second item of \$8.76.”

Judgment.
 MAOMAHON,
 J.

According to the commission the only question was as to these two items of \$125.91 and \$8.76.

The defendant was present as a member of the council when Mr. Munro read his report, and also during the time while the plaintiff was being examined by the commissioner under oath as to the question of interest, and was then made aware from the statement of the plaintiff that the sum of \$125.91 represented in the report as an item of interest, was interest which had accrued on moneys of the plaintiff which he had deposited with the township moneys so as to enable him to receive the higher rate of interest which the bank allowed to the township than what was allowed to ordinary depositors.

The plaintiff was no doubt taking advantage of his position to get more interest from the bank by depositing his own moneys to the credit of the township; and his mixing his own moneys with the township's, was irregular and not a prudent thing to do, but there was nothing fraudulent in it as regards the township.

The evidence of Thomas Stephens at the trial is to the effect, that prior to the application for the commission he heard the defendant say that the \$1,400 once seemed mysterious to him, but he now felt it was a mistake in the audit—simply a mistake.

The evidence of John Logan is to the effect that after the commission issued the defendant told him he was perfectly satisfied that that \$1,400 was all right.

William Scott, the Reeve of the township, gave the

Judgment. following evidence as to what took place at the meeting of
MACMAHON, the council at which Mr. Munro was present, and produced
J. and read his report :

[The learned Judge then made an extract from Mr. Scott's evidence, which in substance was as follows:]

The witness said he had been reeve of the township for the last 13 years, which included the years 1885-7, and was present at the meeting of the council, which was either on the 22nd or 23rd December, he thought the 22nd, although he was not positive, when Mr. Munro read his report : that Mr. Munro examined the plaintiff on oath in the presence of the council, and told the council they had reason to congratulate themselves under their late treasurer; for that, although his accounts were not very regular, the money was ; and it was all accounted for. The witness said he first heard complaints against the plaintiff outside the council board, at the nomination in 1886, when Mr. McKay, the defendant, made some statements about the \$1400. The witness said that the matter of the \$1400 had been discussed at the council board, and the council found it was a mistake of the auditors. He said that McKay had been most active in furthering discussion, and circulated the petition, and although McKay denied it, witness said he had proved that McKay had written the petition. A few members of the council had expressed dissatisfaction with Munro's report, and McKay in particular, because they said it was not Munro's report they wanted, but that of the Government. The council had written Mr. Munro for the Government report, but he said he could not send it, but would come to the council and make a formal report.

The books of the plaintiff, as treasurer of the township, were not kept in a very regular manner, and Mr. Munro, in his report, refers to that fact, and also states that some leaves had been torn out of one of the books.

The plaintiff had written a letter to the *Teeswater News*, which appeared in the issue of that paper of the 3rd of February, 1888, in which he stated that if the council, or auditors, or Government commissioner, could shew he was indebted to the corporation of Culross, he was ready to pay at a moment's notice.

In the issue of the *News* of the 17th of February, the defendant replied to the plaintiff's letter ; and, it is in respect of the alleged libel contained in this letter that the action is brought.

After referring to Mr. Munro's report the defendant in his letter states :

Judgment.
MACMAHON,
J.

"The books did not shew the whole of the interest account, consequently he (Munro) had to apply to other sources for information; and presuming that the information received was correct, and no mixing of moneys, he found that Mr. Colvin was indebted to the municipality \$125 (more or less), and that the total amount received, as interest from all sources, was a little over \$1,300. That is the report as near as I can give it from memory; and I will now make a few remarks thereon. We have to pay \$1,900 each year for sinking fund, and the interest at six per cent., for the 15 years would amount to \$15,700, and there is cash on hand in the bank, balance of collector's roll, &c., that at the same per centage, would give several thousand dollars of interest more, so that Mr. Colvin can well afford to pay over to our Treasurer the amount reported short, and expenses, and have still, according to that calculation, a few thousands. A treasurer has to give a satisfactory account of all moneys received. I would ask if Mr. Colvin did that when he did not post up his interest account. Some people have the idea that a treasurer can make use of a corporation's money for his own benefit; but Harrison in his Municipal Manual says: The money of the municipality should be by the treasurer deposited and kept to the credit of the corporation, and not to his own credit, and not mixed up with the treasurer's private money, and cites *Peers v. Oxford*, as a case in point, so I hope Mr. Colvin will be as good as his word, and pay over without further trouble."

The innuendo in the statement of claim being that the defendant, meaning thereby that Mr. Munro had by his said report found the plaintiff, as such treasurer indebted to the said municipality in the sum of \$135, and that such indebtedness was caused by fraudulent misappropriation by the plaintiff, as such treasurer, of the moneys of said municipality; the defendant also meaning thereby that the plaintiff as such treasurer, had fraudulently appropriated to his own use large sums of money received by him by way of interest upon moneys of the said municipality in his hands during the time he was such treasurer, and had not accounted therefor, and was still indebted to the said municipality in thousands of dollars in respect thereof.

The learned trial Judge held that the matter discussed was one in which the defendant was interested as a rate-payer of the municipality, and as a representative of the other rate-payers in the council, and that a qualified privilege attached to the publication of the letter.

Judgment. There can be no doubt as to the correctness of the learned
MACMAHON, J. Judge's ruling. But it was objected at the trial, and urged at bar, that having held the communication as being privileged, the Judge should have told the jury that malice could not be inferred from the communication complained of, and that it must be shewn by some affirmative evidence outside of that, and that the plaintiff had failed in producing such evidence, and the case should therefore have been withdrawn from the jury.

The law on the question is well settled, and clearly stated in the Court of Appeal in *Clark v. Molyneux*, 3 Q. B. D. 237, where it is laid down that the moment the Judge rules that the occasion is privileged, the burden of shewing that the defendant did not act in respect of the privilege, but from some other and indirect motive, lies upon the plaintiff.

The issue being upon the plaintiff to satisfy the jury that the defendant was actuated by improper motives—that is, that he was acting maliciously—was one of the questions to be submitted to the jury; and the other question was : was the meaning which the plaintiff attached to the letter by the innuendo in the statement of claim the proper meaning to attach thereto, and so libellous.

Then comes the question whether malice may be inferred from the language used in the libel, and the case of *Spill v. Maule*, L. R. 4 Ex. 232, in Ex. Ch.—the judgment of six Judges is conclusive on the point—Cockburn, C.J., in giving judgment, said at p. 235, " We are all agreed that the general proposition contended for by counsel for the plaintiff is right, and that it may be that the language used in the libel, though under other circumstances justifiable, may be so much too violent for the occasion and circumstances to which it is applied, as to form strong evidence of malice, upon the issue of whether the communication is covered by the privilege, and that an inference of actual malice may be drawn from its use. If, therefore, any question of fact arose with respect to the circumstances, it should be left to the jury."

The law as there stated was upheld in *Laughton v. Bishop of Sodor and Man*, L. R. 4 P. C. 495.

Judgment.
MACMAHON,
J.

It was for the jury, considering the circumstances, to say whether the language employed in the letter was within the privilege claimed, or whether it was in excess of what the occasion justified; and, if in excess, they could properly draw the inference of malice. In considering the question of malice the jury had also to consider the means of knowledge possessed by the defendant, and whether with that means of knowledge he must have been aware that the statements were not true; or that with ordinary care he could have satisfied himself that he was misstating the case against the plaintiff. For under these circumstances he loses his privilege, and the occasion does not justify the publication: *Turnbull v. Bird*, 2 F. & F. 508, at pp. 524-5.

The report of the commissioner had been read at the council board six weeks prior to the publication of the defendant's letter; and by the report of the commissioner the whole moneys of the township were accounted for except \$133, and of this sum \$125 had been accounted for to the satisfaction of the commissioner on the 22nd of December, after hearing the plaintiff's explanation under oath.

It was for the jury to say, if the defendant by asserting in the letter complained of that even if the plaintiff paid up the amount mentioned by the commissioner, viz., \$133, he would have a few thousands of dollars left, he meant thereby that there would be a sum of a few thousand dollars in the plaintiff's hands belonging to the township which he was fraudulently withholding. Whether such was the inference the defendant intended should be drawn was for the jury alone; and we cannot say they were not warranted in finding as they did.

The motion must be dismissed, with costs.

GALT, C.J., and ROSE, J., concurred.

Motion dismissed with costs.

[QUEEN'S BENCH DIVISION.]

ATKINSON V. GRAND TRUNK R. W. CO.

Railways—Negligence—Accident—Proximate cause—Impact.

The plaintiffs, husband and wife, sued for damages for injuries sustained by the wife, charging the defendants with negligence in using their railway in shunting cars, &c., and in not notifying and protecting the public at crossings.

The wife was being driven in a cutter by her son along a street which crossed three tracks of the defendants, and when the cutter was thirty feet away a "silent" car passed along one of the tracks. The son pulled the horse up suddenly, with the effect of throwing the mother out of the cutter and so producing the injury complained of.

The jury found that the defendants were guilty of negligence, and that the son by his driving contributed to the accident.

Held, that, upon the evidence, the finding of contributory negligence could not be interfered with; and that the injury was too remote a consequence to be attributed to the negligence of the defendants.

Statement.

ACTION by husband and wife for injuries sustained by the wife resulting from the alleged negligence of the defendants in using their railway in training and shunting cars at crossings in the town of Chatham, as well as in not notifying and protecting the public in crossing such railway.

The trial took place before MACMAHON, J., and a jury, at the Chatham Spring Assizes, 1888.

Mrs. Atkinson was being driven by her son in a cutter with a single horse attached, going south on Queen Street in Chatham, towards their home, which was on the south side of Queen Street. There were three tracks to cross on Queen Street (two main tracks and a siding, the latter being to the north). They approached the siding at the rate, according to young Atkinson, of six or seven miles an hour; he would not swear they were not going seven and a half miles an hour. There were, he said, stationary cars, upon the siding and north main tracks. A "silent" car passed along the south main track at a distance of about thirty feet from the cutter, moving, according to Mr. Atkinson, at the rate of about five miles an hour.

The driver pulled the horse up suddenly with the effect of throwing his mother out of the cutter, and so producing

the injuries complained of. He was quite familiar with the place, crossing it every day. Statement.

The plaintiffs claimed as a breach of duty by defendants their not having some one stationed at the crossing to warn people that there was a car crossing the track. The defendants, while denying this liability, said that for their own protection they had a flagman stationed there for that purpose, and that he did warn Mr. and Mrs. Atkinson.

The jury were asked questions, which they answered as follows :

1st. Were the defendants guilty of any negligence? If so, in what does the negligence consist?

A. Yes. Flagman not capable of attending to both crossings.*

2nd. Did young Atkinson by his driving contribute to the accident which resulted in the injury to his mother?

A. Yes. And they assessed damages.

The learned Judge thought the defendants entitled to the verdict, and ordered judgment to be entered accordingly.

During the Easter Sittings of the Divisional Court in 1888, *Lount*, Q.C., obtained an order *nisi* to set aside the finding on question 2, and for a new trial on certain grounds of alleged misdirection. He also gave a notice of motion to enter judgment for the plaintiffs on the findings of the jury.

Osler, Q.C., moved for a cross-rule.

On 20th November, 1888, *Lount*, Q.C., supported his motions.

Osler, Q.C., shewed cause.

February 4, 1889. The judgment of the Court was delivered by

FALCONBRIDGE, J. :—

As to the grounds taken in plaintiffs' order *nisi*, the finding of the jury in answer to question 2 cannot be said to be against law and evidence, nor is it perverse.

*Another street crossed the tracks not far from Queen Street, and the flagman was stationed between the two.

Judgment. The alleged misdirections are, at most, expressions of opinion on facts disclosed in evidence. Nothing was withdrawn from the jury. No complaint is made of misdirection in law, and the learned Judge was well within the rule laid down in *Dougherty v. Williams*, 32 U. C. R. 215.

It remains to consider the motion to enter a verdict for the plaintiffs.

As to this, we think that the injury complained of was a consequence too remote to be attributed to the alleged negligence of the defendants, even if such negligence existed. The cases where, owing to the neglect of duty by defendants, a plaintiff's horse was allowed to approach so near a passing train that he took fright from it, and so caused the injury, are quite distinguishable. Here, not the animal but the driver took fright, and what followed was not proximately caused by, nor was it the natural and reasonable result of, any act of defendants.

This does not involve the consideration of whether actual impact or contact is indispensable.

Plaintiffs' motion must be dismissed with costs.

Victorian Railways Commissioners v. Coultas, 13 App. Cas. 222; *Mills v. Armstrong*, *ib.* 1; *Rosenberger v. Grand Trunk R. W. Co.*, 8 A. R. 482; *Sharp v. Powell*, L. R. 7 C P. 253; *Vandenburgh v. Truax*, 4 Denio 464.

[QUEEN'S BENCH DIVISION.]

WILLS V. CARMAN.

Defamation—Libel—Question for jury—New trial—Misdirection—Objection at trial—Pleading—Fair comment—Admissibility of evidence of truth of matters commented upon.

In actions of libel new trials are not granted merely on the ground that the verdict is against evidence and the weight of evidence. It is for the jury to say whether alleged defamatory matter published is a libel or not, and the widest latitude is given to them in dealing with it.

When no objection is made at the trial to the Judge's charge, the ground of misdirection is untenable on a motion for a new trial.

In this action of libel the defendant did not plead justification, but he said in his defence that the alleged libel was a fair comment upon matters of public and general interest.

Held, that he was entitled under this defence to shew that the matters upon which he commented were true.

Lefroy v. Burnside, 4 L. R. (Ireland) 556; *Davis v. Shenstone*, 11 App. Cas. 187; and *Riordan v. Willox*, 4 Times L. R. 475, referred to.

THIS was an action of libel for alleged defamatory Statement.
matter published by the defendant in a newspaper published by him, reflecting on the conduct of the plaintiff as treasurer of the county of Hastings, to which action the defendant pleaded "not guilty," and that the alleged libel was a fair and *bond fide* comment upon matters of public and general interest respecting the conduct of a public officer, and was published *bond fide*, and without malice, and for the public benefit.

The cause was tried at the Autumn Sittings of this Court, 1888, at Belleville, before Rose, J., and a jury, when a verdict was found for the defendant.

This was the second trial of the action, directed by the Court of Appeal. See 14 A.R. 656.

The plaintiff moved to set aside the verdict and for a new trial on the following grounds: (1) That the verdict was contrary to and against the weight of evidence (2.) That the learned Judge improperly allowed evidence to be received of the truth of the matters charged as libellous, there being no defence of justification pleaded. (3) That the learned Judge improperly allowed the plaintiff (*sic*) to give in evidence the written report of a committee of

Statement the council of the county of Hastings to said council. (4) That the learned Judge improperly admitted evidence on behalf of the defendant, objected to at the time on behalf of the plaintiff, and which objections and the ruling thereon appear more fully in the notes of proceedings at the trial. (5) Of misdirection on the part of the learned Judge before whom this action was tried, as appears by the shorthand notes of said trial.

November 30, 1888. *Dickson*, Q.C., and *Burdett* supported the plaintiff's motion, before the Divisional Court, all three Judges being present.

Evidence of the truth of the charges made against the plaintiff was not admissible under the defence that the alleged libel was a fair and *bond fide* comment, which is a plea of privilege. It is entirely antagonistic to our rules of pleading, and most unfair to the plaintiff to admit such evidence without a plea of justification: Rule 147 of the O. J. A., 1881; Con. Rules 402, 573; Odgers, (2nd ed.) p. 538; *Vessey v. Pike*, 3 C. & P. 512; *Talbutt v. Clark*, 2 Moo. & R. 312; *Small v. Mackenzie*, Drap. 104; *Underwood v. Parks*, 2 Stra. 1200; *Scott v. Sampson*, 8 Q. B. D. 491, 495; *Davis v. Shenstone*, 11 App. Cas. 187. The verdict was against evidence, and there should be a new trial.

Clute, for the defendant. We had a right to prove the facts upon which comment was made; in other words, it was necessary for us to shew the foundation. We shew that the foundation was there and the comments are for the jury. We do not prove the truth of the comments, but the truth of the foundation. I refer to Odgers (2nd ed.) pp. 32-37, 40, 41; *Davis v. Shenstone*, supra; *Turnbull v. Bird*, 2 F. & F. 508; *Campbell v. Spottiswoode*, 3 F. & F. 421; 3 B. & S. 769; *Gathercole v. Miall*, 15 M. & W. 319. Malice has nothing to do with this defence; it is just as if we pleaded "not defamatory."

Dickson, in reply. The defendant, if he wished to give evidence of the truth of the foundation, should have

given notice of it on the pleadings; this defence gave no Argument. notice of it, and was misleading if it was relied on to embrace the evidence given.

February 4, 1889. The judgment of the Court was delivered by

ARMOUR, C. J. :—

According to the usual practice of this Court new trials are not granted in actions of libel such as this, merely on the ground that the verdict is against the evidence and the weight of evidence. It is for the jury to say whether alleged defamatory matter published is a libel or not, and the widest latitude is given to them in dealing with it.

And, even if we thought that the jury ought more properly to have found for the plaintiff on the evidence, we do not think it would conduce to the interest of the public or to that of the litigants to prolong this litigation by granting a new trial.

No objection appears to have been made to the charge of the learned Judge, and the ground of misdirection is therefore untenable.

The written report of the committee of the county council of Hastings was made by a committee asked for by the plaintiff himself, and was admissible in evidence, as it was received, in mitigation of damages, by reason of what took place between the plaintiff and defendant.

The matter chiefly argued before us was whether the learned Judge erred in permitting evidence to be given of the truth of the facts commented upon by the defendant in the alleged defamatory matter published by him in his newspaper, there being no plea justifying the publication of the alleged defamatory matter by reason of its truth.

The defendant did not justify nor did he seek to justify the alleged defamatory matter published as being true, but he alleged that it was a fair comment upon matters of public and general interest and he was entitled to shew that the

Judgment. matters upon which he commented were true, and
ARMOUR, without doing so it is clear that he could not have estab-
C.J. lished his plea of fair comment.

In *Lefroy v. Burnside*, 4 L.R. (Ireland) 556, Palles, C.B., said, p.565: "That a fair and *bond fide* comment on a matter of public interest is an excuse of what would otherwise be a defamatory publication is admitted. The very statement, however, of this rule assumes the matters of fact commented upon to be somehow or other ascertained. It does not mean that a man may invent facts, and comment on the facts so invented, in what would be a fair and *bond fide* manner on the supposition that the facts were true.

"Setting apart all question of form, the questions which would be raised at a trial by such a defence must necessarily be—first, the existence of a certain state of facts; secondly, whether the publication sought to be excused was a fair and *bond fide* comment upon such existing facts. If the facts as a comment upon which the publication is sought to be excused do not exist, the foundation of the plea fails." See also *Davis v. Shenstone*, 11 App. Cas. 187, and *Riordan v. Willox*, 4 Times L. R. 475.

The motion must be dismissed with costs.

[QUEEN'S BENCH DIVISION.]

REGINA V. RYMAL.

Criminal law—False pretences—Contract to pay money—Giving promissory note instead of money—Valuable security.

The defendant, by untrue representations, made with knowledge that they were untrue, induced the prosecutor to sign a contract to pay \$240 for seed wheat. The defendant also represented that he was the agent of H., whose name appeared in the contract. H. afterwards called upon the prosecutor and procured him to sign and deliver to him a promissory note in his, H.'s, favor for the \$240. The contract did not provide for the giving of a note, and when the representations were made the giving a note was not mentioned. The prosecutor, however, swore that he gave the note because he had entered into the contract.

The defendant was indicted for that he, by false pretences, fraudulently induced the prosecutor to write his name upon a paper so that it might be afterwards dealt with as a valuable security; and upon a second count for, by false pretences, procuring the prosecutor to deliver to H. a certain valuable security.

Held, upon a case reserved, that the charge of false pretences can be sustained as well where the money is obtained or the note procured to be given through the medium of a contract, as when obtained or procured without a contract; and the fact that the prosecutor gave a note instead of the money, by agreement with H., did not relieve the prisoner from the consequences of his fraud; the giving of the note was the direct result of the fraud by which the contract had been procured; and the defendant was properly convicted on the first count as being guilty of an offence under R. S. C. ch. 164, sec. 78; but

Held, that the note before it was delivered to H. was not a valuable security, but only a paper upon which the prosecutor had written his name so that it might be afterwards used and dealt with as a valuable security; and the conviction of the defendant upon the second count could not stand.

Rez v. Danger, Dears & B. C. C. 307, followed.

CROWN case reserved and stated by the Judge of the County Court of the county of Ontario, from the County Judge's Criminal Court: Statement.

At the session of this Court held on the 4th day of January, 1888, John W. Rymal was tried before me upon a charge that he did at the township of Reach in said county on the third day of June, 1887, unlawfully, knowingly, and designedly, falsely pretend to one William Christopher St. John, that he the said John W. Rymal had before then obtained from John Swannick, Benjamin Flewell, and Samuel Douglas, three farmers, their respective agreements signed by them respectively to sow certain bushels

Statement. of fall seed wheat on — acres of land; namely, the said Swannick and the said Flewell four bushels each, and the said Douglas two bushels, and to harvest, thresh, and deliver on the first day of November, 1888, one-half of the wheat produced therefrom to the farmer from whom the said Swannick, Flewell, and Douglas should so receive the said fall seed wheat, to be sown as aforesaid.

And that he the said Rymal had agreements of the like tenor and effect for the sowing, harvesting, and threshing, including the agreements particularly above mentioned, of twenty-six bushels of fall seed wheat, and the delivery of one-half of the wheat to be produced therefrom on the terms aforesaid.

And that the said John W. Rymal was then acting for one Thomas Hope, who had thirty bushels of the Blue Mountain Improved Seneca Fall Wheat, which was to be delivered to the several persons who he alleged had signed agreements for the sowing in the aggregate of twenty-six bushels of fall seed wheat, and the harvesting, threshing, and delivering of the produce thereof as aforesaid, and the said William Christopher St. John to the extent of four bushels, by means of which false pretences the said John W. Rymal then unlawfully, fraudulently, and knowingly did induce the said St. John to write his name on a certain paper on which was written a promissory note for \$240, payable to the said Thomas Hope eight months after date, at the express office, Uxbridge, so that the same might be afterwards used or dealt with as a valuable security for the benefit of Hope and with intent to injure St. John.

There was also another count setting out the same false pretences, and that by reason of them St. John was procured to deliver to Hope a certain valuable security, the promissory note above mentioned, for the benefit of Hope, with intent to defraud and injure St. John.

The formal charge against the defendant negatived the said false pretences and alleged that the said Rymal well knew these pretences were false when he did so falsely pretend, against the form of the statute, &c.

The counsel for the defendant contended that the making of the note to Hope was not due to the representations of the defendant, but to what was represented by Hope when he delivered the thirty bushels of wheat to and claimed from the prosecutor the money mentioned in the agreement which Rymal had obtained from him, and delivered to Hope.

They contended that the signature of the note by the prosecutor was too remote a consequence of any representation made by the defendant to render him criminally liable under the statute.

The prisoner's counsel also contended that the promissory note obtained by the defendant from the prosecutor was not a valuable security within the meaning of the Act, and they relied on *Regina v. Brady*, 26 U. C. R. 13, and cases cited therein.

I ruled against these contentions. The defendant called no witnesses. I found on the evidence that the defendant made the several representations charged, and that they were untrue to his knowledge when he made them.

I also found that the prosecutor St. John relied on his representations, and was induced by them to sign an agreement to pay \$240 for the thirty bushels of wheat on the delivery thereof, and that the prosecutor was induced by reason of the representations of the defendant to make the said promissory note, and to deliver it to the said Hope. In view of the peculiar circumstances of the case, and the decision in *Regina v. Brady*, I did not sentence the prisoner, but determined to ask the opinion of the Court above upon the following points :

1. Was there sufficient evidence to warrant my finding the defendant guilty of procuring the said note to be delivered to the said Thomas Hope for his benefit, although the agreement obtained from the prosecutor by Rymal only provided for the payment of \$240 in money, and the giving of a promissory note was not mentioned or suggested by Rymal ?

2. Was the signing and delivering of the note by the prosecutor to Hope, under all the circumstances, too remote

Statement. a consequence of the prisoner's representations to make him criminally liable?

3. Was the note delivered by the prosecutor to Hope a valuable security within the meaning of the statute?

February 4, 1889. The case was argued before the Justices of the Queen's Bench Division.

Dow, for the prisoner.

Farewell, for the Crown.

March 7, 1889. The judgment of the Court was delivered by

ARMOUR, C. J. :—

We understand from the case reserved that the learned Judge has found that the representations made by the prisoner to the prosecutor to induce the prosecutor to enter into the contract were untrue; that the prisoner knew at the time he so made such representations to the prosecutor that such representations were untrue; and that the prosecutor was induced by such representations so made by the prisoner to him, not only to enter into the said contract, but also afterwards to write his name to the promissory note set out in the indictment, to be used and dealt with as a valuable security.

The only representations made by the prisoner to the prosecutor were made at and before the prosecutor entered into the contract, and the contract did not provide for the giving of a note by the prosecutor for the price of the wheat to be delivered, but provided only for the payment of the stipulated price therefor; and during such representations the giving of a note for the price was not mentioned or suggested. The prisoner, however, represented that he was the agent of Hope, with whom the contract was made, and Hope demanded the fulfilment of the contract by the prosecutor, by either the payment

of the stipulated price or by the giving of a promissory note therefor, and the prosecutor gave the note because, as he said, he had entered into the contract.

Judgment.
ARMOUR,
C.J.

The charge of false pretences can be sustained as well where the money is obtained or the note procured to be given through the medium of a contract, as when they are obtained and procured to be given without any contract.

The prosecutor was bound, or believed he was bound, and the prisoner intended he should be bound, by the contract, which he had been induced to enter into by the fraud of the prisoner, to pay the stipulated price for the wheat; and the fact that he gave a note instead of the money, by agreement with Hope, the prisoner's principal, did not relieve the prisoner from the consequences of his fraud, for the prosecutor gave the note because he had made the contract, and to carry out the contract with the principal Hope, which he had been induced to enter into by the fraud of Hope's agent, the prisoner.

The same false pretence which operated on the prosecutor's mind to induce him to enter into the contract, would have operated on his mind to induce him to pay the stipulated price in money, if he had done so; and operated on his mind to induce him to give the note.

The giving of the note was equally referable to the fraud by which the contract had been procured as the payment of the stipulated price in money would have been, and was the direct result of that fraud.

We answer, therefore, questions numbers one and two in the affirmative.

The prisoner was, therefore, properly convicted upon the first count of the indictment, as being guilty of an offence under R. S. C. ch. 164, sec. 78, for he, with intent to defraud the prosecutor, by false pretences, fraudulently induced him to write his name upon a paper so that the same might be afterwards used and dealt with as a valuable security.

The third question is rather obscure, "Was the note delivered by the prosecutor to Hope a valuable security

Judgment. within the meaning of the statute?" The note upon being
ARMOUR delivered to Hope was a valuable security; before it was
C.J. delivered to Hope it was a paper upon which the prosecutor
had written his name so that it might be afterwards used
and dealt with as a valuable security.

We think the second count open to the objection successfully raised in *Regina v. Danger*, Dearsley & Bell 307. We are, therefore, of opinion that the conviction of the prisoner upon the first count of the indictment should be affirmed, and that the conviction should be confined to that count.

See *Regina v. Kenrick*, 5 Q. B. 49; *Regina v. Abbott*, 1 Den. C. C. 273; *Regina v. Burgon*, Dearsley & Bell 11; *Regina v. Gardner*, Dearsley & Bell 40; *Regina v. Bryan*, 2 F. & F. 567; *Regina v. Martin*, L. R. 1 C. C. R. 56; *Regina v. Greathead*, 14 Cox 108; *Regina v. Larner*, 14 Cox 497; *Regina v. Burton*, 16 Cox 62; *Regina v. Brady*, 26 U. C. R. 13.

[CHANCERY DIVISION.]

CAMERON V. GIBSON.

*Mortgage—Conveyance—Merger—Chattel mortgage of growing crops—
Fructus industriales.*

A. C., owner of certain lands, mortgaged them to a loan company, and afterwards executed two successive mortgages to one H. Afterwards, in 1887, A. C. sowed a quantity of fall wheat, and in January, 1888, made a chattel mortgage of this wheat to G., which chattel mortgage was properly registered. On April 4th, 1888, before the harvest, under pressure from H., A. C. conveyed to H. the lands for a consideration equal to what was due on the three mortgages, and a small additional unsecured debt due from him to H. On April the 5th, 1888, H. leased the property to A. J. C. for a year.

When the fall wheat was ripe, A. J. C. cut and harvested it, but G. sent and seized it under his chattel mortgage, and A. J. C. now brought this action to recover its value.

Held, that on his taking the conveyance from A. C., the rights of H., as mortgagee, were merged, for the evidence pointed strongly against an intention on his part that the mortgage debts should remain, and therefore G.'s right as chattel mortgagee became prior in point of time to the title of H., and the action must be dismissed. As mortgagee, H. would no doubt have had the right to take possession of the crops as part of his security.

THIS was an action brought to recover the value of certain crops seized by the defendant under circumstances which are fully set out in the judgment. Statement.

The action came on for trial at the Assizes at Walkertown, on March 14th, 1889, before Street, J.

Klein, for the plaintiff.

H. P. O'Connor and *F. S. O'Connor*, for the defendant.

March 18th, 1889. STREET, J.:—

This was an action tried before me at the Walkerton Assizes, on March 14th, 1889. The facts, as I find them, are as follows:

Angus Cameron, the father of the plaintiff, was for many years the owner and occupant of lot 6, 14th concession of Greenock. Before the year 1881, he mortgaged it to the Canada Permanent Loan and Savings Co., to secure pay-

Judgment.
STREET, J ment of \$1,200 and interest. On February 18th, 1881, he mortgaged it again to R. M. Hay, to secure \$642 and interest; and on January 22nd, 1886, he mortgaged it again to R. M. Hay to secure \$474 and interest.

In the Fall of 1887, whilst these three mortgages were all in force, and all largely in arrear, Angus Cameron sowed eight acres of fall wheat upon the property. In January, 1888, he made a chattel mortgage to the defendant of this fall wheat then in the ground, and of a quantity of farm stock and implements, to secure payment of advances made to him by the defendant, and this chattel mortgage was properly filed.

In April, 1888, Hay hearing that the Loan Company were pressing Angus Cameron for payment of the arrears due on his mortgage, told him that he must give him up the land at once or he would foreclose. Cameron pleaded for leave to retain the property until after harvest, but Hay refused, and thereupon on April 4th, 1888, Angus Cameron executed to him a conveyance of the property for the expressed consideration of \$3,800. Hay was called as a witness and explained that the consideration was intended to represent the amount then due upon the three mortgages, and a further sum of \$200 due him by Angus Cameron, these amounts being as follows:

Due on the mortgage to the Canada Permanent Loan and Savings Co.....	\$1,800 00
Due on two mortgages to Hay	1,797 70
Loan unsecured	200 00
	<hr/>
	\$3,797 70

At the time of this conveyance Angus Cameron remained in possession of the property. On the following day—viz. April 5th, 1888, Hay made a lease to the plaintiff, A. J. Cameron, a son of Angus Cameron, for a year at the rent of \$174, which was not alleged to be other than a fair rent. A. J. Cameron had been living on the place with his father up to the time the lease was made, and his

father remained with the other members of the family on the place when the plaintiff became the tenant. No motive was suggested which should render this an improper arrangement at the time. Hay wished to begin to derive a rent at once from the property, and thought no doubt that he would be more likely to obtain it from a young and vigorous man, such as the plaintiff appeared to be, than from his father, who was old and moreover accustomed to owe money to Hay which he was not able to pay.

Before the lease was obtained, the Camerons had held a family council and other arrangements with regard to another home had been proposed, but been found impracticable. It was then that the plaintiff went to Hay and made arrangements for the lease which he obtained, and under which he became a *bond fide* lessee of the property.

When the fall wheat was ripe, the plaintiff cut, harvested and threshed it; the defendant then sent out an agent and seized it and carried it away, claiming to be the owner under his chattel mortgage. The quantity taken was eighty-four to eighty-five bushels, worth \$1 a bushel at the time. The plaintiff brings this action to recover the value of this wheat.

The defendant in his statement of defence, sets up his chattel mortgage from Angus Cameron, and alleges notice of it to the plaintiff before the making of the lease from Hay under which the plaintiff claims the property. The plaintiff replies that the chattel mortgage so far as it relates to the wheat, was obtained by fraud upon Angus Cameron, the mortgagor. I think this issue must be decided against the plaintiff. The defendant swears that the growing crops were included in the chattel mortgage now in question, and also in two former chattel mortgages given at intervals of about a year by Angus Cameron to him, with the full knowledge and consent of the mortgagor. Angus Cameron being called as a witness for the plaintiff, swore that he was not aware that the crops were included in any of the chattel mortgages. He stated further, however, on cross-examination that he told the defendant when

Judgment.
STREET, J.

Judgment. the chattel mortgages were being drawn that he might include all his property in them, and that he would willingly have given the crops with the rest of the property covered by them, if the defendant had asked him to do so; his memory was apparently a defective one, and he admitted that the quantity of land stated in the chattel mortgage as being sown with fall wheat in each year, was correctly stated; he was unable to explain how the defendant could have obtained this information without asking him for it. The written document itself, and the probabilities therefore all support the defendant's story, and there is nothing at all to corroborate that of Angus Cameron.

The question as to the ownership of the wheat must, therefore, depend upon whether, under the circumstances I have stated, the rights of the defendant under the chattel mortgage are or are not paramount to those of Hay the lessor of the plaintiff; and this, I think, must be determined by ascertaining whether in taking a conveyance from Angus Cameron, Hay's rights as mortgagee were or were not merged.

If Hay had simply taken possession of the land as mortgagee, he would have been entitled, certainly as against the mortgagor, to hold the crops as a part of his security: *McDowell v. Phippen*, 1 O. R. 143, and the cases there cited; and inasmuch as the defendant in taking his chattel mortgage, was subsequent to the Hay mortgages, he must be held to have taken it with the knowledge that the mortgagee might exercise his right to take possession, and to keep the crops as part of his security; in other words, his position is not stronger than that of Angus Cameron his mortgagor. If then Hay has not by taking the conveyance from Angus Cameron lost his rights as mortgagee, he was entitled to the crops growing at the time he took possession as against the defendant, and they passed by the lease to the plaintiff.

A mortgagee may take from the mortgagor a release of the equity of redemption in any land without thereby

merging the mortgage debt as against any subsequent mortgagee or person having a charge upon the same property: R. S. O. ch. 102, sec. 8. Judgment.
STREET, J.

Therefore, if the intention of the parties is that the mortgage debt shall remain, it may remain notwithstanding that the equity of redemption is released to the mortgagee.

The evidence points strongly against there being an intention on the part of the mortgagee that the mortgage debt should remain.

The consideration mentioned in the conveyance, is the full amount of the incumbrances upon the land, due not only to the grantee Hay, but also to the Canada Permanent Loan Company; and it further includes as Hay says, a debt apart from the mortgages which was due him from Angus Cameron. The covenant for quiet possession in the conveyance, is qualified by the addition of the following words: "Save and except a certain mortgage made by the parties of the first and second parts to the Canada Permanent Loan and Savings Company, Toronto, a balance of which is unpaid, and which the party of third part agrees to pay out of the purchase money; and also two mortgages to the said Robert M. Hay, the party hereto mentioned as the party of the third part."

This conveyance is dated April 4th, 1888; the lease from Hay to the plaintiff is dated April 5th, 1888, and on April 6th, 1888, Hay executed, and on April 7th, 1888, registered, discharges of the two mortgages from Angus Cameron to him. I think that there is here a total absence of any evidence of an intention to keep alive the mortgage debt, and a presence of much to shew a contrary intention. Hay's position upon taking the conveyance was then only what that of a third person would have been who had come in and purchased the land from Cameron for \$3,800, agreeing with him to pay the mortgages out of the purchase money. The mere fact that the releases of mortgage were not registered until after the lease to the plaintiff cannot affect the plaintiff's right; the terms of the conveyance

Judgment. itself were such as might at all events, well have put him
STREET, J. on enquiry, and he cannot say in the face of it, and without having made enquiry, that he relied upon Hay's right as mortgagee.

The chattel mortgage to the defendant then becomes prior in point of time to the title under which the plaintiff's claims. Growing crops such as these, sown by the person in possession, and intended to be reaped at maturity, being *fructus industriales*, are chattels seizable under execution, and the ownership of them is not an interest in land within the 4th sec. of the Statute of Frauds. They are bound by the delivery to the sheriff of an execution against the owner, and they must equally be bound by the act of the owner. They are not within the Registry Act, because they are chattels, independently of the form of the agreement to transfer them and of the period, before or after severance, at which the property in them is to pass to the purchaser. The defendant became the owner of them by his chattel mortgage at the time it was executed, but subject always to the chance that Hay, the mortgagee of the land, might exercise his right to enter into possession and take them before they were reaped. The mortgages were paid off, however, whilst the crops were still in the ground, and there is nothing prior to the chattel mortgage, which the plaintiff can set up against the defendant's right under it. The conveyance from Angus Cameron to Hay passed the land subject to the existing rights of the defendant under his chattel mortgage of the crops; and the lease from Hay to the plaintiff passed no greater interest.

I think, under these circumstances, that the action must be dismissed with costs.

A. H. F. L.

[CHANCERY DIVISION.]

THE ANGLO-CANADIAN 'MUSIC PUBLISHERS' ASSOCIATION
(LIMITED) v. J. SUCKLING & SONS.*Copyright—British—Canadian—R. S. C. ch. 62—Importation of works
—Prior Canadian copyright.*

There is a very clear distinction to be observed in the Copyright Act, R. S. C., ch. 62, between works which are of prior British copyright and those which are of prior Canadian copyright. If there is a prior British copyright, and thereafter Canadian copyright is obtained by the production of the work, then, by section 6, that local copyright is subject to be invaded by the importation of lawful British reprints.

But if the Canadian copyright is first on the part of the author or his assigns, then, under section 4, the monopoly is secured from all outside importation.

The Imperial Parliament has sanctioned and reiterated colonial legislation whereby the possessor of a prior Canadian copyright is secured completely against all interference to the territorial extent of the Dominion, even as against English reproductions or copies made under a subsequent British copyright.

THIS was a special case stated for the opinion of the Court in the above action, and was in the following words : Statement.

1. The plaintiffs are a duly incorporated company having their registered office in London and their trading and publishing establishment in the city of Toronto, in the Province of Ontario.

2. That the opera known and designated as "Ruddigore, or the Witch's Curse," was written by W. S. Gilbert, and the music composed by Sir Arthur Sullivan, and the said Gilbert & Sullivan were, at the dates of the following assignments, the proprietors of the said opera.

3. That by deeds of assignment, bearing date respectively the 27th and 31st days of January, 1887, the said Gilbert and Sullivan sold and assigned to the plaintiffs all their (the vendors') respective rights within and through the Dominion of Canada, but not elsewhere, in the words and music of the said opera, and also the exclusive liberty and license to do all acts necessary to obtain copyright of the said words and music.

4. The said deeds are produced and may be referred to for greater certainty as to their contents.

5. The said deeds were duly recorded in the office of the Minister of Agriculture for the Dominion of Canada, on the 24th day of February, 1887, and the 12th day of March, 1887, respectively.

6. That under the provisions of section 13 of ch. 62, of the R. S. C., being the Canadian Copyright Act, and in manner prescribed by the Act the plaintiffs, as the assignees and legal representatives of the authors, secured interim copyright to the said opera at the times following—namely,

Statement. to the words thereof on the 14th day of February, 1887, and to the musical composition on the 12th day of March, 1887, notice of which interim copyright was duly published as required by the Act.

7. That the plaintiffs duly obtained the final copyright to the said words and music at the times following—that is to say, in the said words on the 23rd day of February, 1887, and in the musical composition on the 23rd day of March, 1887, and the said copyright still continues in full force and effect.

8. That on or about the 7th day of January, 1887, the said W. S. Gilbert and Sir Arthur Sullivan by a verbal license granted to Chappell & Company, music publishers in London England, the right to publish the opera in Great Britain and Ireland.

9. That the said opera and all the arrangements or adaptations of the music of the said opera in the waltz, polka, or otherwise, were first published within the United Kingdom of Great Britain and Ireland, by the said Chappell & Company, under their said verbal license on the 14th day of March, 1887, and that the copyright in the said opera has not yet been entered at Stationer's Hall in England, as provided by the Copyright Act in force in Great Britain and Ireland.

10. That the defendants, after the plaintiffs obtained their Canadian copyright imported into Canada from Great Britain and Ireland for the purposes of sale and offered for sale without the consent and license of the plaintiffs, adaptations and arrangements of and taken from the said opera and published under the names of "Ruddigore Waltz," "The Ruddigore Polka," "The Ruddigore Lancers," and the "Ruddigore Quadrille."

11. The said adaptations and arrangements were sold on the English market by the said Chappell & Company, and were purchased by the defendants from them.

12. That the said several arrangements and adaptations are based upon the original designation and music of the opera and contain a large and substantial portion of the original music, and it is admitted that they would be infringements upon the plaintiffs' copyright if the defendants are not legally entitled under the facts to import them.

13. The defendants claim that under the Canadian Copyright Act, they were entitled to purchase in England and to import from Great Britain and Ireland for the purposes of sale, and to sell in Canada copies of the said publications published and sold there under the said license, notwithstanding the plaintiffs' Canadian copyright; while on the other hand the plaintiffs contend that they are the assignees and legal representatives of the authors within the meaning of the Act, and have as such acquired their Canadian copyright, and are entitled to an injunction prohibiting such importations from Great Britain and Ireland into Canada for the purposes of sale and for selling the said copies here.

The question submitted to the opinion of the Court is :

1. Whether under the circumstances stated the defendants were entitled to import into Canada from Great Britain and Ireland for the purposes of sale the arrangements of the works published and sold there of which the plaintiffs have the Canadian copyright.

2. It is agreed that should the question be answered in the negative, Statement. that is, against the right to import, that judgment be entered upon the special case, and in the action, for the plaintiffs for \$8 damages and the costs of the action, including the motion for injunction and special case.

3. And in the event of the question being answered in the affirmative, that is against the plaintiff's claim, then that the judgment be entered for the defendants upon the special case, and in the action with costs of the said case and action, including the motion for injunction.

The matter came on for argument on January 17th, 1889, before Boyd, C.

Bain, Q. C., for the plaintiff.

Cussels, Q. C., for the defendant.

The following Acts relating to copyrights, were referred to and commented on in the argument: R. S. C. ch. 62; Imp. 5 & 6 Vic. ch. 45; Imp. 10 & 11 Vic. ch. 95; 31 Vic. ch. 56, (D.); 38 Vic. ch. 88, (D.); Imp. 38 & 39 Vic. ch. 53. Also Copinger on Copyright, 2nd ed., pp. 499, 707, 709; Shortt's Law of Literature, 2nd ed., p. 749; Canadian Debates of the House of Commons of the Dominion of Canada, for 1875, p. 778; Senate Debates, 1875, p. 256; and *Smiles v. Belford*, 23 Gr. 590, 604, were also referred to.

February 28th, 1889. BOYD, C.:—

A very clear distinction is to be observed in this Act, R. S. C. ch. 62, between works which are of prior British copyright, and those which are of prior Canadian Copyright. If there is prior British copyright, and thereafter Canadian copyright is obtained by production of the work, then by section 6, that local copyright is subject to be invaded by the importation of lawful British reports. But if the Canadian copyright is first on the part of the author or his assigns, then under section 4 the monopoly is secured from all outside importation.

The former Copyright Act of 1872, was disallowed by the Imperial authorities, because it was in conflict with Imperial legislation. But in the notification of disallow-

Judgment.

BOYD, C.

ance, Lord Carnarvon recognized the constitutional position that the Parliament of Canada under the B. N. A. Act, had power to deal with Colonial copyright within the Dominion, and intimated his hope that a measure would be passed which, while preserving the right of the owner of copyright works in the United Kingdom and Ireland, would give effect to the views of the Canadian Government and Parliament: *Canada Sessional Papers*, 1875, vol. viii. No. 28.

The outcome of these negotiations is to be found in the present Act, passed in 1875, and ratified by the Imperial Statute the same year, 38 & 39 Vict. ch. 53. There is a clause in this English Act providing that Canadian reprints under the Dominion Act of 1875, shall not be imported into the United Kingdom unless by or with the authority of the English copyright owner (sec. 4). That appears to be in some sense the converse of the provision now in question in the Canadian Act. That severed from its connection, reads thus: "Nothing in this Act shall be held to prohibit the importation from the United Kingdom of copies of such works legally printed there." But the word "such," introduces the context, and limits the proviso to cases where there is an existing or a prior British copyright, in respect of which the Canadian one may be considered subordinate, as being in time subsequent.

This construction of the Act is entirely in harmony with the suggestions of the Royal Copyright Commissioners on the subject of Colonial copyright. This commission was appointed because of the Canadian Act of 1875, 38 Vic. ch. 88, (D.), which it was feared might clash with the Imperial Act, 5 & 6 Vic. ch. 45. Appointed in the same year they reported in May, 1878, and among their recommendations was this: that Colonial reprints of copyright works first published in the United Kingdom, should not be admitted into the United Kingdom without the consent of the copyright owner; and that reprints in the United Kingdom of copyright works first published in any colony should not be admitted into such colony without the con-

Judgment.

BORD, C.

sent of the copyright owners: Copinger on Copyright, 2nd ed., pp. 504-5; Scrutton's Principles of Copyright, sec. 94. Clause 4 of the English Act of 1875, Imp. 38 & 39 Vic. ch. 53, is on the line of the first part of their suggestion; and the clause now in question in our Act, looks very like a response to the latter part of their advice. I gather from the remarks of the Hon. Alex. McKenzie, (then premier) in the *Hansard* of March 11th, 1875, that the draft of this measure had been submitted by the Imperial authorities to the Canadian Government, pp. 642, 781. Subsequent legislation in England is also in accord with the construction I place upon the clause in dispute. Then in the late statute of 49 & 50 Vic. ch. 33, respecting Colonial copyright to which my attention was not called during the argument, I would refer to section 8: "The Copyright Acts shall * * apply to a work first produced in a British possession, in like manner as they apply to a work first produced in the United Kingdom;" and in sub-sect. 4 of the same section, it reads, "Nothing in the Copyright Acts * * shall prevent the passing in a British possession of any Act * * respecting the copyright within the limits of such possession of works first produced in that possession." And by the dictionary clause of the Act "produced," means "published," &c., (sec. 11). This latest English Act was first in force on June 25th, 1886, and the assignment of the Canadian copyright of this musical composition was made by Gilbert and Sullivan to the plaintiffs in January, 1887.

Very different was the question agitated in *Smiles v. Belford*, 23 Gr. 590. There the owner of the British copyright sought to restrain the unauthorized use of his work in Canada, no Canadian copyright being involved. But here the British authors before publication or copyright in England, assign their right in the work over Canadian territory, upon which a perfect Canadian copyright is obtained prior to publication or copyright in England. My reading of the Act is such as to protect fully this Colonial copyright. It does not purport to inhibit dealers

Judgment. in England from selling to whom they will ; but if the
Boyd, C. purchasers seek to introduce the copies so purchased into Canada, then the Act applies, and rightly so, as against an English author who has previously parted with his rights in Canada, and all taking under him in England. Mr. Cassels' arguments as to the indirect effect of the statute in hampering English trade, and so being in conflict with Imperial policy, if not legislation, might have had prevailing force some years ago—I need not say how many—but happily now, more liberal commercial relations obtain between the mother country and her dependencies ; and in regard to Canada, one may venture to say that its practical commercial independence has been recognized.

To sum up the whole matter (the validity of copyright monopolies not being now open to discussion) the Imperial Parliament sanctions and reiterates Colonial legislation whereby the possessor of a prior Canadian copyright is secured completely against all interference to the territorial extent of all the Dominion, even as against English reproductions or copies made under a subsequent British copyright.

According to the terms agreed upon in the special case, as I answer the question submitted, in the negative, *i. e.*, against the right to import, judgment will be entered for the plaintiffs for \$8 damages and costs.

A. H. F. L.

[COMMON PLEAS DIVISION.]

HUNTINGDON V. ATTRILL.

Foreign judgment—Action for penalty—Effect of, in suing in this Province.

The defendant was a shareholder and director in a joint stock company, incorporated under the laws of the State of New York, having its head office in that State. The plaintiff, a creditor of the company for money loaned to the company, sued and recovered judgment against defendant for an alleged false certificate given by defendant while such director as to the amount of paid up stock in the company, whereby, under certain statutes of the said State, defendant became liable by way of penalty to all the debts of the company. In an action in this Province on the judgment.

Held, that as the only cause of action which the plaintiff alleged was based on an offence committed against the laws of the State of New York, and the only sum he sought to recover was the penalty imposed by statute of the said State as the punishment for the offence, the judgment could not be recognized as creating a debt enforceable in this Province.

THIS was an action by the plaintiff upon a judgment for *Statement*. \$100,240.03, recovered by him, on 15th June, 1886, in the Supreme Court of the State of New York against the defendant and one Soutter.

The only defence relied upon at the trial was that which was raised by the fourth paragraph of the statement of defence, viz., that the cause of action upon which the judgment was recovered existed under the following circumstances :

The defendant was a shareholder and director of a certain incorporated joint stock company, having its head office in the State of New York, duly incorporated under the laws of that State, called the "Rockaway Beach Improvement Company," and the plaintiff claiming to be a creditor of the said company, for money loaned by him to the said company, alleged that the defendant, as director of the said company, had, contrary to the provisions of certain Acts of the Legislature of the said State of New York, signed certain certificates in relation to the said company's affairs, which were false, whereby, under and by virtue of the said Acts and the laws of the said State

Statement.

of New York, the defendant became liable by way of penalty to the extent of all the debts of the said company contracted while the defendant was such director; and, in fact, the plaintiff's said cause of action as against the defendant was to enforce the said penalty, and was, in fact, what is commonly called and known as a penal action; and the defendant said that the plaintiff could not have maintained an action in this Province against the defendant on the said original cause of action, nor could he as the defendant submitted, upon the said alleged judgment, there having been no merger of the said original cause of action in the said alleged judgment; and the defendant further submitted that such alleged judgment was not enforceable, and would not be enforced in this Province.

The action was tried before Street, J., sitting at Osgoode Hall, without a jury, on the 10th September, 1888.

Cattunach, for the plaintiff.

Osler, Q.C., for the defendant.

The learned Judge reserved his decision, and afterwards delivered the following judgment:

September 15th, 1888. STREET, J. :—

The exemplification of the judgment upon which the action was brought was put in by the plaintiff, and evidence taken upon commission was read identifying the defendant in the present action as one of the defendants in the action in the Supreme Court of New York, and that Court was shewn to be a Court of Record.

The pleadings in that action are fully set out in the exemplification. The plaintiff charges that the defendants, being two of the directors of an incorporated joint stock company called "The Rockaway Beach Improvement Company, limited," signed, and severally verified each by his oath, a certain certificate, pursuant to the Act under which the company was incorporated, to the effect that the full amount of the capital stock of the company had been paid in, being the

sum of \$750,000 : that such certificate was false in a material representation, to wit, in that it represented that all the capital stock of the said company had been paid for in cash ; whereas, no part of such capital stock was paid for in cash ; and that such certificate was false in another material representation, to wit, in that it represented that such part of the capital stock as had not been paid for in money had been paid for in labour done or property actually received for the use and legitimate purposes of the said company, at its fair value, whereas at least \$500,000 of the capital stock was never paid for, either in money, labour done, or property received, or otherwise : that the plaintiff was a creditor of the company for money lent to the amount of \$100,000, which had not been repaid ; and by reason of the premises he demands judgment for the amount of his claim as a creditor of the company, against the defendants in the action.

Judgment.
STREET, J.

The defendants deny that the certificate contained either of the representations alleged ; and denies that it was false in any respect.

The record concludes with an award after a trial by a jury of the issues joined, of judgment against the defendants for \$100,240.03.

The evidence taken under commission shewed that the action was founded upon a violation by the defendants of section 21, of ch. 611, of a statute of the State of New York, passed 21st June, 1875, which is in the following words :

"Sec. 21. If any certificate or report made, or public notice given by the officers of any such corporation, be false in any material representation, all the officers who shall have signed the same shall be jointly and severally liable for all the debts of the corporation contracted while they are officers thereof."

Mr. B. F. Tracey, a lawyer practicing in New York, and formerly a Judge of the Court of Appeal of the State of New York, stated, in his evidence, that the clause in question, though not expressly declared to be penal by the

Judgment. statute itself, was deemed to be penal in its nature : that
STREET, J. an Act of a strictly analogous nature to it had been held
in the Court of Appeal to be strictly penal and punitive ;
and that its provisions were considered to be so made upon
grounds of public policy ; and that no provision of the Act,
ch. 611, gave to any director any right to contribution
against any other director who has joined with him in any
false report or certificate on account of any sum of money
collected under a judgment recovered against him in an
action founded in any such report or certificate.

Upon the argument before me no question was made as
to the general rule that our Courts will not examine foreign
judgments upon the merits, but will in ordinary cases order
judgment to be entered here upon the proper proof being
given of their recovery in order that they may be enforced
in this Province.

This general rule is subject to several qualifications and
exceptions. The particular exception relied upon by the
defendant here is thus stated by Lord Loughborough in
Folliott v. Ogden, 1 H. Bl. 124, at p. 135 : " The penal laws
of foreign countries are strictly local, and affect nothing
more than they can reach and can be seized by virtue of
their authority."

In Bar's *International Law*, at p. 574-5, the author thus
states his view of the law : " In one case only must recog-
nition and execution always be refused to a judgment
issued abroad—viz., where the judgment is really in a
penal action. The Court to which application is made for
execution can only co-operate in so far as its law declares
the judgment to be absolutely just. It is then inevitably
necessary that the whole matter should be investigated
anew."

In Story's *Conflict of Laws*, 8th ed., sec. 620, it is stated :
" The common law considers crimes as altogether local
and cognizable, and punishable exclusively in the country
where they are committed. No other nation, therefore,
has any right to punish them, or is under any obligation
to take notice of, or to enforce any judgment rendered in

such cases by the tribunals having authority to hold jurisdiction within the territory where they are committed.” Judgment.
STREET, J.

Westlake, in his *Private International Law*, sec. 403, refers to “the rule well fixed in England, that no effect is ever given to foreign penal laws otherwise than in pursuance of a treaty.”

In Piggott’s *Foreign Judgments*, 2d ed., p 209, the rule is stated thus: “It is an universal rule that the penal laws of a country are of no effect beyond the limits of the country; consequently judgments proceeding on such laws will not be recognized in any other State.”

In Halleck’s *International Law*, ed. 1878, p. 196, sec. 29, he says: “A criminal sentence, pronounced under the municipal law of one State can have no legal effect in another. If it be a conviction, it cannot be executed without the limits of the State in which it is pronounced; and if such conviction be attended with civil disqualifications in the country where pronounced, these disqualifications do not follow the offender into another independent State. In the words of Martens: ‘a sentence which attacks the honour, rights, or property of a criminal cannot extend beyond the Courts of the territory of the Sovereign who has pronounced it, so that he who has been declared infamous, is infamous in fact, but not in law, and the confiscation of his property cannot affect his property situate in a foreign country.’”

In Wharton on *Conflict of Laws*, 2nd. ed., sec. 4, the following statement of the law is made: “To the rule that the law, to which a case is from its nature subject is to govern it everywhere, there are several marked exceptions. The first is, that such law must not infringe the distinctive policy of the forum. The second is that one State will not execute the penal laws of another. This, so far as concerns the penalties imposed on crimes, will hereafter be fully illustrated. *But the rule also applies to civil suits for penalties.*”

The English authorities cited in support of this latter statement are *Ogden v. Folliott*, 3 T. R. 720, and *Wolf v.*

Judgment. *Oxholm*, 6 M. & S. 99. The American authorities cited
STREET, J. are very numerous.

And again, at sec. 833, the same author says: "We have already seen that penal laws have no extra territorial force. The same limitation applies to foreign penal judgments, since otherwise all that would be necessary to give ubiquitous effect to a penal law would be to put it in the shape of a judgment." He here cites in a footnote, Brocher, *Droit int. privé* "Les jugements rendus en matière pénale ne dépassent généralement pas les frontières."

In Rorer's *Interstate Law*, ch. 15 ph. 1, p. 148, it is said that "Statutory penalties can only be enforced in the Courts of the State by the laws of which they are imposed; they cannot be enforced elsewhere, either by force of the statute creating them, nor upon the principles of comity."

The opinion of Lord Kames is thus stated in his *Principles of Equity*:

"The proper place for punishment is where the crime is committed, and no society takes concern in any crime but what is hurtful to itself"; and after stating the duty to enforce judgments and decrees for civil debts and damages, he states as an exception to this duty, "but this includes not a decree decerning for a penalty, because no Court reckons itself bound to punish, or to concur in punishing any delict committed *extra territorium*."

The opinions of jurists and text writers seem to be unanimous as to the existence of the rule stated by Lord Loughborough in *Folliott v. Ogden*, 1 H. Bl., at p. 135, and repeated by the Court upon the further argument of the same case reported as *Ogden v. Folliot*, 3 T. R. 720.

The facts of that case are concisely stated thus in the headnote:

"A. and B. being inhabitants of the United States of America, while those States were colonies of Great Britain, and before the war broke out between the two countries, B. executed a bond to A. During the war, after

the declaration of independence by the Congress, both parties are attainted, their property confiscated, and vested in the respective States, of which they were inhabitants, by the Legislative Acts of those States, and a fund provided for payment of the debts of B."

Judgment.

STREET, J.

The Court of Common Pleas held "that A. may maintain an action on the bond against B. in England; that the several Acts of attainder and confiscation, as passed by Sovereign independent States did not disable A. from suing, nor exempt B. from being sued in England."

To the same effect are the decisions of *Adams v. Worden*, 6 Lower Canada. Rep. 237, and *Lynch v. Provincial Government of Paraguay*, L. R. 2 P. & D. 268.

See also the elaborate judgment of the Supreme Court of the United States delivered by Mr. Justice Gray in the late case of *State of Wisconsin v. Pelican Ins. Co. of New Orleans*, reported 8 Sup Ct. Reporter 1370, in which this question is fully considered.

The case of *Batthyany v. Walford*, 36 Ch. D. 269, was relied on by the plaintiff's counsel as establishing that English Courts will enforce penalties imposed by the laws of foreign countries; but the principle upon which that case was decided does not by any means support this contention, the obligation imposed by the foreign statute being treated by the English Court as being an obligation in the nature of an implied contract.

The principle stated by Lord Loughborough, and repeated by the various writers to whom I have referred, must, I think, be treated as very clearly settled; and it becomes necessary to enquire whether the action brought by the plaintiff against the defendant and Soutter in the Supreme Court of New York, was founded upon a penal law within the intention and scope of the principle so laid down.

It is to be observed that the action is clearly not based upon any contract express or implied; but is founded entirely upon the liability imposed by the statute; and that liability is not measured or affected by any question as to whether or not a creditor has sustained damage by

Judgment. reason of the false statement complained of, but is absolute
STREET, J. to the extent of the whole of the debts of the corporation upon the false statement being proved. The liability created is entirely statutory, and the present plaintiff by the form in which his action is brought so treats it, and does not claim the amount of his debt against the company as being due from the defendants, either as upon a contract or a tort; but insists that, by reason of the false statement in the certificate, he claims the amount of his debt from the defendants.

In Potter's Dwarrior on Statutes, p. 74, a penal statute is defined as being "one which imposes a forfeiture or penalty for transgressing its provisions, or for doing a thing prohibited."

Abbott's Law Dictionary, at p. 261-2, defines a "penal law" as "a law which expressly defines or limits the punishment of any offence."

Wharton's Law Lexicon, 7th ed., p. 614, defines "penal laws" as "those laws which prohibit an act, and impose a penalty for the commission of it. They are of three kinds: *pœna pecuniaria*, *pœna corporalis*, and *pœna exilii*."

In *Merchants Bank v. Bliss*, 35 N. Y. 412, which appears to be the leading case in that State upon the point, a statute to the same effect as the one here relied on, is said to be strictly penal and severely punitive in its character, and to have been passed upon grounds of public policy, with the object of protecting the public against false statements by the officers of incorporated companies, and for punishing them for false statements if made.

This case has apparently been followed ever since in a series of decisions which are referred to in the comparatively late case of *Stokes v. Stickney*, 96 N. Y. 323.

The statement of Mr. Tracey, the American lawyer, who was examined upon commission, as to the view taken by the Courts of the State of New York of the nature of the statute, seems to be fully borne out by these decisions; and in my opinion it should be adopted by me in deciding this case, commending itself to me, as it does, as being a proper view of the character of the legislation in question.

It was further contended by the plaintiff's counsel that

even supposing the action to have been originally one of a penal nature, the fact of the recovery of the judgment had merged the original nature of the claim ; and that the mere fact that a judgment had been recovered created a debt due from the defendants to the plaintiff which the Courts here would enforce irrespective of the nature of the liability upon which the judgment was originally founded.

The question of the extent to which the original cause of action is merged in a foreign judgment, has been much discussed. See the cases collected under the *Duchess of Kingston's Case*, Smith L. C., 9th ed., p. 868, *et seq.*, and the elaborate discussion of the question in the first chapter of Piggott on Foreign Judgments, 2nd. ed., p. 1 *et seq.*; and see also *Woodruff v. McLennan*, 14 A. R. 242.

I do not think, however, that it is necessary for me in the present case to come to any conclusion upon the point. The nature of the claim of the plaintiff against the defendants in the action in the New York Court, and of the issues joined in that action, are fully set out in the exemplification of the judgment which the plaintiff has put in ; and, although it may be quite true that our Courts would not in the absence of any plea here of fraud or error examine into the merits of the verdict found upon those issues, yet they certainly will not close their eyes and refuse to see what was the nature of the original cause of action ; and seeing, as they must see from the plaintiff's own evidence, that the only cause of action which the plaintiff alleges is one based upon an offence committed by the defendants against the laws of the State of New York, and that the only sum which he seeks to recover is the penalty fixed by the statute of the State of New York as the punishment for that offence, I think it is their duty to say that they will not recognize that judgment as creating a debt enforceable in this Province, "otherwise," to quote again from Wharton's Conflict of Laws, 2nd. ed., sec. 833 "all that would be necessary to give ubiquitous effect to a penal law would be to put it in the shape of a judgment."

I think for these reasons that the action must be dismissed, with costs.

Judgment.
STREET, J.

[COMMON PLEAS DIVISION.]

MURCHISON V. MURCHISON.

Trusts and trustees—Limitation of actions—Marriage settlement—One of beneficiaries taking possession—Subsequent appointment as trustee—Title by possession.

On 25th July, 1853, J. M., by marriage settlement, conveyed certain property, including an hotel, to trustees to permit him to receive the rents for his life, excepting a life annuity to his wife, and on his death, subject to such annuity, to pay annuities to each of his two daughters, S. M. and C. A. M., and subject thereto to divide the balance of the rents annually into three equal shares, and to apply one share to the support and education of the children of a deceased son, W. M. M.; another share to a son, R. D. M., and the third share to his daughter, F. E. C., with limitations over. On 27th March, 1860, by a decree in chancery W. and O. were appointed trustees in the place of B. and P., and the trust estate was vested in them. J. M. died on 12th March, 1870. W. M. M.'s children all died in J. M.'s lifetime, and their said one-third share having thereby reverted to J. M., he disposed of same by his will. On 10th May, 1882, judgment of the High Court was pronounced, directing the removal of W., the surviving trustee, that an account be taken, and appointing R. D. M. and R. C. trustees; and also directing that all lands, etc., and all other assets both real and personal now vested in W. as such trustee, be vested in R. D. M. and R. C. upon the several trusts in the said settlement and will. On the death of J. M., R. D. M. had entered into possession of the hotel and continued in such possession, receiving the rents to his own use without any question after the said judgment, and up to his death on 17th April, 1887. By his will and codicil, dated respectively 27th April, 1880, and 25th October, 1881, he devised to his executors his real estate, consisting of the said hotel property, upon trust to pay the rents to his wife for life, and after her death to divide same equally among his children. In 1888 an action was brought by three of his children to have it declared that the hotel was vested in R. C., the surviving trustee, under the trusts of the settlement, etc.

Held, that the action could not be maintained, for that when R. D. M. took possession of the hotel in 1870 he did not go in under the trustees, but adversely to them, and continued to so hold till his death, and the judgment of May, 1882, whereby R. D. M. was appointed one of the trustees, and the trust estate vested in them, could not be extended beyond its ordinary meaning so as to take away a property of which he had become the absolute owner and put it back into the trust estate.

Statement.

THIS was an action tried before STREET, J., without a jury at Toronto.

The cause was entered for trial at the Spring Assizes of 1888, but for the convenience of the parties was adjourned, and tried at Osgoode Hall, on the 10th of January, 1889.

The pleadings and evidence are fully set out in the judgment.

J. K. Kerr, Q.C., and F. M. Morson, for the plaintiff. *Argument.*
S. H. Blake, Q.C., and Walter Read, for the defendants.

January 15, 1889. STREET, J. :—

On 25th July, 1853, by a marriage settlement under seal, John Murchison conveyed to Thomas Bell and Daniel Perry certain lands, including, amongst others, a property upon King street, in the city of Toronto, known as the Clyde Hotel, to them their heirs and assigns forever upon the following trusts : To permit and suffer John Murchison, the settlor, to receive the rents and profits for his life to his own use, excepting an annual sum of £25, to be paid to Eliza his wife during her life ; upon the death of the settlor, and subject to the annuity of £25 to his wife, to pay to Sarah Murchison and Charlotte Anne Murchison, daughters of the settlor, each £60 a year during their lives, and, subject to such payments, to divide the balance of the rents annually into three equal shares, one of which they were to apply in the support and education of the children of Wm. McKenzie Murchison, a deceased son of the settlor : another of which they were to pay to Richard Duncan Murchison, a son of the settlor and the third share they were to pay to Francis Emily Coones, a daughter of the settlor ; in the event of the death of Richard Duncan Murchison or Francis Emily Coones the share of rents to which they were respectively entitled, was to be applied towards the support and maintenance of their children. Upon the death of all the children of the settlor living at the date of the settlement, the trust property was directed to be divided equally among all his grand-children then living, subject to a special provision in regard to the annuity of the settlor's wife, which does not become material.

The marriage settlement contains a power to the trustees to sell lands and invest the proceeds.

Eliza Murchison, the wife of the settlor, died during his lifetime.

Judgment.

STREET, J.

On the 27th March, 1860, by a decree of the Court of Chancery in a suit of *Murchison v. Perry*, Thomas C. Watkins and Stephen A. Oliver were appointed trustees of the marriage settlement in place of Bell and Perry; and the trust estate was vested in them.

On the 12th March, 1870, John Murchison, the settlor, died, and his son Richard Duncan Murchison, went into possession of the Clyde Hotel property, and remained in possession by his tenants and in receipt of the rents and profits to his own use without hindrance, claim, or interruption until his death on the 17th April, 1887.

At the time of the death of the settlor, John Murchison, he left him surviving, the following descendants named in the marriage settlement:—Richard D. Murchison, his son; Sarah Murchison, Charlotte Murchison, his daughters, and Frances Emily Coones, his grand-daughter, being the only child of his daughter Frances Emily Coones, mentioned in the marriage settlement.

The children of William Mackenzie Murchison all died in the lifetime of the settlor; and no provision having been made in the marriage settlement for the happening of that contingency, the share of the rents which would have gone to the children of William Mackenzie Murchison, had they survived him, reverted to the settlor, and was disposed of in his will by a direction that £10 out of it should be paid annually to each of his daughters Sarah and Charlotte, and that the balance of the income should be accumulated and be treated and divided as principal money along with the other trust fund.

On the 16th February, 1882, Sarah and Charlotte Murchison brought an action against Thomas C. Watkins, the surviving trustee of the marriage settlement, and against the executors of Stephen A. Oliver, the other trustee, who died after his appointment, and against the executor of the settlor, praying that the trust accounts might be taken; that Watkins might be removed, and two new trustees might be appointed.

On the 10th May, 1882, judgment was pronounced in

that action by which Richard Duncan Murchison, and all his children, and Frances Emily Coones, the granddaughter of the settlor, were added as parties defendants, and appeared by counsel or guardian: it was ordered that Thomas C. Watkins should be removed from his office of trustee: that his accounts should be taken; and that Richard Duncan Murchison and Reuben Coones should be appointed trustees under the marriage settlement.

Judgment.
STREET, J.

The judgment proceeds to order and adjudge "that all the lands, tenements, premises, goods, chattels, * * and all other assets, both real and personal, *now vested in the said Watkins as such trustee as aforesaid*, be and the same are hereby vested in the said Richard Duncan Murchison and Reuben Coones, their heirs, &c., according to the respective natures of the estates hereby vested, as joint tenants, for all the estate, right, title and interest of the said Thomas C. Watkins therein and thereto, *upon the several trusts in the said settlement and will*," &c.

Richard Duncan Murchison continued to receive and apply to his own use without question the rent of the Clyde Hotel property, after as well as before this judgment. He died on the 17th April, 1887, leaving a will bearing date the 27th April, 1880, with a codicil, bearing date 25th October, 1881, by which he devised to his executrix and executor Catherine Jane Murchison and John Roderick Murchison, his real estate consisting of the "Clyde Hotel," upon trust to pay the rents to his widow for life, and after her death to divide the rents equally between his children; and upon the death of all his children but one, then upon trust for that one in fee simple.

The children of Richard Duncan Murchison are: Richard H. Murchison, George W. Murchison, Frances Emily Moore, John Roderick Murchison, Harriet Louise Murchison, Charlotte Anne Murchison, Leda Jane Murchison, Caroline Alberta Murchison, Frederick Duncan Murchison, Arthur Wellington Murchison, Stephen Oliver Murchison, Millissa Maud Murchison, and Herbert Murchison.

All the foregoing facts were admitted at the trial.

Judgment.
STREET, J.

The present action is brought by Richard H. Murchison, George W. Murchison, and Frances Emily Moore, three of the children of Richard Duncan Murchison, against Catharine Jane Murchison, the widow, and John Roderick Murchison, Harriet Louise Murchison, and Charlotte Anne Murchison, three of the children of Richard Duncan Murchison, and Reuben Coones, the surviving trustee of the marriage settlement, praying that it may be declared that the Clyde Hotel property is vested in the said Reuben Coones, as the surviving trustee; and that he may be ordered to take possession of it as such trustee; and that an account may be taken of the rents and profits of it since the death of John Murchison, the settlor.

The statement of claim alleges that on the 12th March, 1870, Richard Duncan Murchison, *wrongfully entered into possession of the Clyde Hotel property, and remained in wrongful possession until he was appointed trustee* on the 10th May, 1882, and that from that time forward he remained in possession as such trustee until his death, and received the rents and profits as such trustee, but wrongfully applied them to his own use and benefit in fraud of the rights of the plaintiffs and of all others interested under the marriage settlement; and that upon his death his widow, the defendant Catharine Jane Murchison, entered into possession and took the rents and profits of the said Clyde Hotel property, and has ever since remained in possession of the same, and has made no return of such rents to the trustees of the settlement.

The defendants Catharine Jane Murchison and John Roderick Murchison, deny that the settlor was the owner in fee of the property in question at the time of the settlement, and claim title in Richard Duncan Murchison as heir at-law of one John J. Murchison; and also by length of possession.

The defendant Reuben Coones, in his statement of defence, says that on his appointment as trustee he found Richard Duncan Murchison in possession of the Clyde Hotel property, and understood he was in possession as

owner, and never heard his title questioned during his lifetime; and he submits his rights to the Court.

Judgment.
STREET, J.

The other two defendants Harriet Louise and Charlotte Ann Murchison submit that their brothers and sisters not made parties to the action, ought to be made parties.

The action was entered for trial at the Toronto Spring Assizes, 1888, but was adjourned for the convenience of the parties, and was tried at Osgoode Hall before me, on the 10th January, 1889.

The admissions which I have set forth above were made by the parties; and the marriage settlement, the copies of the wills of John Murchison and Richard Duncan Murchison, and the pleadings and proceedings in the two actions of *Murchison v. Perry*, and *Murchison v. Watkins*, were put in.

It was further admitted that upon the death of John Murchison, the settlor, when Richard Duncan Murchison took possession of the Clyde Hotel property, the trustees under the settlement took possession of an adjoining parcel of land of the same dimensions, to which they had no title as trustees, and which the settlement did not cover, and that they had ever since held it as part of the trust property.

There is nothing in the facts to lead to the conclusion that Richard Duncan Murchison took possession on 12th March, 1880, under the trustees; but everything to lead to a contrary conclusion. He received the rents himself, and applied them to his own use, treating himself throughout as absolute owner; and by his will he purported to deal with the property as his own by devising it to his wife and children. His possession is charged by the plaintiffs in their pleadings to have been a wrongful possession from the beginning. It is true that he was one of the beneficiaries under the marriage settlement, and as such was entitled to receive from the trustees a part of the rents, but this did not entitle him to the possession of the land, the right to which was vested by the marriage settlement in the trustees.

Judgment.

STREET, J.

I think that the case is governed by the principles laid down by Lord St. Leonards in *Burroughs v. McCreight*, 1 J. & L. 290. Richard Duncan Murchison did not place himself in the shoes of the trustees when he took possession on 12th March, 1870, but took possession adversely to them, and continued to hold adversely to them until his death.

On 10th May, 1882, when he was appointed a trustee under the marriage settlement, his possession had already some two years before ripened into a statutory title, and he was the owner in fee, the title of the trustees having become extinguished. This being the state of things in May, 1882, the terms of the judgment by which he was appointed a trustee, and by which the trust estate was vested in him and Coones, cannot be extended beyond their ordinary meaning in order to take away from him a property of which he had become the absolute owner, for the purpose of putting it back into the trust. The words of the judgment which I have quoted above do not in their terms extend to this property; they are expressly limited to property which was vested in the surviving trustee Watkins at the date of the judgment. This property was at that date vested, not in the trustee Watkins, but in Richard Duncan Murchison, and it was therefore unaffected by the judgment, and remained still vested in him as his own property, and it did not become vested in the trustees.

I think the action should be dismissed, with costs, and I direct judgment to be entered accordingly. I will, if desired by the plaintiffs, stay the entry of judgment until the next Sittings of the Divisional Court.

An application was made to me during the argument by the plaintiffs' counsel to strike out the portion of the statement of claim which charges that Richard Duncan Murchison wrongfully entered into possession; but there being no evidence upon which I could act in doing so I refused the application. The admissions made at the trial lead me to the conclusion that the pleading correctly sets out the nature of his possession.

[QUEEN'S BENCH DIVISION.]

UNITED COUNTIES OF LEEDS AND GRENVILLE V. TOWN OF BROCKVILLE.

*Canada Temperance Act—Application of fines—49 Vic. ch. 48, sec. 2 (D.)
—Construction of orders in council—County and town.*

The Canada Temperance Act came into force in the united counties of L. and G. on 1st May, 1886. On 2nd June, 1886, the Parliament of Canada passed the Act 49 Vic. ch. 48; sec. 2 of which provided that the Governor in Council might from time to time direct that any fine, etc., which would otherwise belong to the Crown for the public uses of Canada, should be paid "to any provincial, municipal, or local authority which, wholly or in part, bore the expenses of administering the law under which such fine, etc., was enforced, or that the same should be applied in any other manner deemed best adapted to attain the objects of such law and to secure its due administration."

On 29th September, 1886, an order in council was passed directing that all fines, etc., recovered or enforced under the Canada Temperance Act within *any city or county* which had adopted the Act, which would otherwise belong to the Crown for the public uses of Canada, should be paid to the treasurer of the city or county, as the case might be, for the purposes of the Act.

On the 15th November, 1886, a second order in council was passed directing that the first should be cancelled, and that all fines, etc., recovered or enforced under the Act within *any city or county or any incorporated town separated for municipal purposes from the county*, should be paid to the treasurer of the city, incorporated town, or county, as the case might be, for the purposes of the Act.

The town of B. was at the time the Act was brought into force an incorporated town separated from the counties of L. and G. for municipal purposes; and between the dates of the two orders in council the police magistrate of the town paid to the treasurer of the counties \$750, the amount of fines recovered and enforced by him for violations of the Canada Temperance Act within the town.

Held, STREET, J., dissenting, that, in the absence of any application by the treasurer of the counties of the money so paid to him, the town of B. was entitled to recover it from the counties. The passing of the second order in council was a complete revocation of the first, and the second was retroactive in the sense that it provided for the application of all fines, etc., theretofore recovered or enforced.

Per STREET, J.—The first order in council operated as a gift from the Crown to the municipality, with an intimation added as to the purpose to which it was expected the gift would be applied, but carrying with it no legal obligation that it should be applied in any particular manner. It was a complete gift; the money was finally at home, so far as the Crown was concerned, when the municipality received it, and the revocation of the order could not revoke a completed transaction, nor retract that which had been actually done under it.

ACTION for a balance of \$770 due by the defendants to the *Statement.* plaintiffs on an agreement for the use of the county buildings.

Statement.

The defendants admitted the plaintiffs' claim, but pleaded a set-off in respect of the following matters :

On 1st May, 1886, the second part of the Canada Temperance Act, 1878, came into force in the united counties of Leeds and Grenville, pursuant to order in Council to that effect, after a vote of the duly qualified electors.

The town of Brockville was a municipality within the said united counties, and was, within the meaning of the order in council of 15th November, 1886, an incorporated town separated for municipal purposes from the county ; and since the Act came into force a large number of persons were prosecuted before the magistrates of the town, and many were convicted for offences committed against the Act in the town.

During the period of time from the coming into force of the Act, until the coming into force of the order in council of 15th November, 1886, the sum of \$750 was received by the Police Magistrate of the town for fines imposed upon persons for offences against the Act committed in the town, and the said sum of \$750 was paid over by the Police Magistrate to the plaintiffs' treasurer on their behalf.

By 49 Vic. ch. 49, sec. 2 (D.) :—

2. "The Governor in Council may, from time to time direct that any fine, penalty, or forfeiture, or any portion thereof, which would otherwise belong to the Crown for the public uses of Canada, be paid to any provincial municipal, or local authority, which wholly or in part bears the expenses of administering the law under which such fine, penalty, or forfeiture is imposed, or that the same be applied in any other manner deemed best adapted to attain the objects of such law and to secure its due administration."

By order in council dated 29th September, 1886, the Governor in Council ordered that "All fines, penalties, or forfeitures recovered or enforced under the Canada Temperance Act, 1878, and amendments thereto, within any city or county which has adopted the said Act, which

would otherwise belong to the Crown, for the public uses ^{Statement.} of Canada, be paid to the treasurer of the city or county, as the case may be, for the purposes of the Act."

By an order in council dated 15th November, 1886, after reciting the said second section of 49 Vic. ch. 48, it was ordered "That the order in council of 29th September, 1886, relating to the application of fines and penalties imposed under the said Act, be and the same is hereby cancelled, and that all fines, penalties, or forfeitures recovered or enforced under the Canada Temperance Act, 1878, and amendments thereto, within any city or county or any incorporated town separated for municipal purposes from the county, which would otherwise belong to the Crown for the public uses of Canada, be paid to the treasurer of the city, incorporated town, or county, as the case may be, for the purposes of the said Act."

The defendants claimed the sum of \$750 received by the plaintiffs through their treasurer, in pursuance of the order in council of 29th September, alleging that they, the defendants, had during the period that the \$750 was received by the Police Magistrate expended more than \$750 for the purposes of the Act; and that the plaintiffs did not expend any money for the purposes of the Act or of enforcing the same in the town of Brockville, or with respect to offences committed against the said Act in said town.

The defendants also claimed to set off a sum of \$20 for another matter which was not in dispute.

The plaintiffs replied denying the expenditure by the defendants for the purposes, &c., and claiming, themselves, to have duly and properly expended in the salaries of inspectors employed from the coming into force of the Canada Temperance Act until 15th November, 1886, for enforcing the Act in the united counties, including the town, sums amounting to more than the moneys received by them under the order in council of 29th September, 1886.

The plaintiffs also demurred to the statement of defence and on the demurrer coming on for argument before

Statement. Armour, C. J., it was referred by him for argument before the Judge at the trial of the issues of fact. The grounds of demurrer were these :

(a) The order in council of 15th November, 1886, is not retrospective.

(b) No right is conferred on the defendants by said order in council to the sum of \$750, in the statement of defence mentioned.

(c) No trust is created in favor of the defendants by the order in council of 29th September, 1886.

(d) The defendants have no right to inquire into the expenditure of, or call the plaintiffs to account for, the moneys received by them under the said order in council.

The case was tried at Brockville on the 8th November, 1888, before ROBERTSON, J. It was shewn that the united counties of Leeds and Grenville were, for the purposes of the Canada Temperance Act, divided into the district of Brockville and South Leeds and the district of North Leeds and Grenville and South Grenville.

Under 41 Vic. (O.) ch. 14, sec. 6, as amended by 44 Vic. ch. 27, sec. 34, the board of license commissioners for the license district of Brockville and South Leeds, by notice in writing dated 27th May, 1886, estimated the expenses of enforcing the provisions of the second part of the Canada Temperance Act, 1878, in the said license district for the license year 1886-7 at a balance of \$380, and required the clerk of the united counties of Leeds and Grenville forthwith to deposit to the credit of the license fund two-thirds of the balance, being the sum of \$253.33.

By an amended notice dated 25th September, 1886, they increased the estimated balance to \$610, and required a deposit of \$406.67, which included the formerly demanded sum of \$253.33.

By notice dated 1st June, 1886, the commissioners for North Leeds and Grenville and South Grenville required the deposit of \$633.33, being two-thirds of an estimated balance of \$950.

On the 13th and 16th October, 1886, the Police Magistrate paid to the counties' treasurer the sum of \$1,725.85 for fines and penalties collected by him in town and county up to the latter date, which sum included \$750, the amount of fines and penalties collected in the town.

The Police Magistrate received in 1886 a salary of \$1,000 from the town. The town furnished and paid a clerk for him and provided him with a police court office, with fuel and light, &c. When sitting to adjudicate on cases arising outside the town, the Police Magistrate held his court (with an associate justice) in the town.

No moneys were paid out by the counties' council for Scott Act purposes until January, 1887; the by-law authorizing the payments having been passed on 27th November, 1886; before which date the attention of the council had been called to the fact that \$750 had been paid in to their treasurer as fines imposed and collected within the town of Brockville.

A claim was made by the town and brought before the counties' council on the 25th January. It was left over to the June session, when, after a report of a special committee on the subject, payment was refused.

ROBERTSON, J., gave judgment for the defendants, both on the demurrer and on the facts.

Notice of motion by way of appeal, and asking for judgment in their favour for \$750, was given by plaintiffs on the ground that the judgment of the learned Judge was against law and evidence, and on other grounds, the same in substance as those alleged as grounds of demurrer to the statement of defence.

November 29, 1888. *Shepley*, for the motion. The moneys were properly paid over to the counties' treasurer under the first order in council. There is no evidence that the omission in the first order of the words "incorporated town," was a mistake; on the contrary, the first order is strictly in accordance with sec. 2 (b) of the Canada Tem-

Argument.

perance Act, R. S. C. ch. 103. There is strong intrinsic evidence that there was no mistake. The second order is not retrospective, and does not do away with any rights acquired under the first order. It is not declared to be retrospective and cannot be held to be so. *The Queen v. Vine*, L. R. 10 Q. B. 195, relied on by the trial Judge, is distinguishable.

Fraser, Q. C., for the defendants. The intention was that the fines should be expended for the purpose of carrying out the Act. No harm is done by acceding to the defendants' contention; the plaintiffs have incurred no expenditure in carrying out the Act in the town. The same words in both orders in council must have the same construction. It was plainly intended that the first order should take effect on past fines; so, therefore, the second. I refer to *Kay v. Goodwin*, 6 Bing. 576, 582.

Aylesworth, on the same side. The analogy is to the case of a paymaster or steward disbursing the moneys of his superior; unexpended moneys in his hands are, of course, the moneys of his superior. The counties were formerly, and the town is now, the disburser of the money for the purposes of the Act. Not having been disbursed, it remains to be disbursed by the town. In this view there can be no question of vested right. I refer to *Surtees v. Ellison*, 9 B. & C. 750; *Salmon v. Duncombe*, 11 App. Cas. 627; *Regina v. Shavelear*, 11 O. R. 727.

February 4, 1889. FALCONBRIDGE, J. :—

(After stating the facts.) It must, I think, be conceded that the object of the legislation and of the order in council is to secure for the particular local authority the benefit of all fines, &c., imposed and recovered within its own territory. On grounds of public policy, this position is not open to attack. This object is carried out in the second order in council, and not in the first, so that I think the second order should be held to be retroactive unless the contrary clearly appears to be the intention, or unless by so holding

we do violence to some recognized rule of construction and interpretation. Judgment.

Falconbridge,
J.

As to the intent. The same words are used in both orders, "all fines, penalties, and forfeitures *recovered or enforced*." It cannot be contended that these words are not retroactive in the first order, and I am unable to see why we should read them in the second as if they were "hereafter to be recovered," &c.

The first order is "cancelled" by the second, (*i. e.*, blotted out, obliterated, annulled,) not amended, nor even superseded.

It is also significant that among the orders in council, proclamations, and other documents bound up with the Statutes of Canada for 1887, the second order in council appears at page clvii—the first order appears nowhere—and no reference to the first order appears in the second order as there printed; the words referring to the cancellation, which appeared in the *Gazette*, being here omitted.

If the intention is clear, I think no canon of construction intervenes to prevent the retroactive operation: *The Queen v. Vine*, L. R. 10 Q. B. 195; Maxwell on Statutes, 2nd ed., 266 *et seq.*, and cases there cited.

"When an Act of Parliament is repealed, it must be considered (except as to transactions past and closed) as if it had never existed:" per Lord Tenterden, C. J., in *Surtees v. Ellison*, 9 B. & C. at p. 752; *Kay v. Goodwin*, 6 Bing., at p. 582.

There is nothing in the payment over to the counties treasurer to give the present case the quality of a "transaction past and closed," even if it were rightly paid over to the counties, which I do not deem it now necessary to consider. The counties did not pay out the money, nor incur obligations on the strength of the payment to them. The money was paid to them "for the purposes of the Act," and it is strictly in furtherance of the purposes of the Act that they should now repay it to the town.

In my opinion, this motion should be dismissed with costs.

Judgment. ARMOUR, C. J. :—

ARMOUR,
C.J.

(After setting out part of the statute and the orders in council.) The defendant corporation is an incorporated town separated from the counties of Leeds and Grenville for municipal purposes, and was so at the time the Canada Temperance Act was brought into force ; and between the dates of the said respective orders in council the Police Magistrate of the town paid over to the treasurer of the counties the sum of \$750, being the amount of fines recovered and enforced by him within the town of Brockville, for violations of the Canada Temperance Act within that town.

The board of license commissioners for the license district of Brockville and South Leeds on the 27th May, 1886, made a demand upon the united counties of Leeds and Grenville for the sum of \$253.33, under the provisions of 41 Vic. ch. 14, sec. 6, (O.), as amended by 44 Vic. ch. 27, sec. 34, (O.) ; and on the 25th September, 1886, the same board made a demand upon the united counties for the sum of \$406.67, under the said provisions ; the latter sum demanded including, as was said, the prior sum demanded ; and the board of license commissioners for the license district of North Leeds and Grenville and South Grenville, on the 1st June, 1886, made a demand upon the said united counties for the sum of \$633.33, under the same provisions.

None of these demands were complied with, nor was anything done towards compliance therewith, nor was any liability incurred by the said united counties in respect thereof, except only the liability created by the service thereof, until after the passing and notification thereof to them of the order in council of the 15th November, 1886 ; and the liability created by the service of these demands was one enforceable irrespective altogether of the passing of the Act 49 Vic. ch. 48, (D.)

The first branch of section 2 of 49 Vic. ch. 48 authorizes the Governor in Council from time to time to direct

that any fine, penalty, or forfeiture, or any portion thereof, which would otherwise belong to the Crown for the public uses of Canada, be paid to any provincial, municipal, or local authority, which wholly or in part bears the expenses of administering the law under which such fine, penalty, or forfeiture is imposed. The second branch of the section authorizes the Governor in Council from time to time to direct that the same be applied in any other manner deemed best adapted to attain the objects of such law, and to secure its due administration.

Judgment.
ARMOUR,
C.J.

The first branch contemplates absolute payment; the second branch contemplates application only; it is to the second branch of the section, and not to the first, that these orders in council are referable, and this plainly appears from the direction therein for the payment to the treasurer "for the purposes of the Act;" those purposes being the attainment of the objects of the Act and to secure its due administration.

These orders in council amounted to no more than mandates or directions by the Governor in Council for the application of the fines, penalties, and forfeitures imposed under the Canada Temperance Act for the purposes of that Act, to attain its objects, and to secure its due administration, and were therefore revocable, except as to anything done or liability incurred thereunder.

If the Governor in Council instead of passing the order in council of the 15th November, 1886, had simply passed an order in council of that date cancelling the order in council of the 29th September, 1886, and the Crown had then demanded from the treasurer of the united counties of Leeds and Grenville all fines, penalties, and forfeitures imposed under the Canada Temperance Act, which had been paid to him under the order in council of the 29th September, 1886, what defence could have been set up to such demand, in the absence of any application by him thereof, or of any liability incurred by him in respect thereof? In my opinion, no defence, and if so, the question is determined.

Judgment.

ARMOUR,
C.J.

Suppose that the order in council of the 29th September, 1886, instead of providing for payment to the treasurer, had provided for payment to the County Judge or to the County Attorney, and that then on the 15th of November, 1886, an order in council had been passed cancelling the order in council of the 29th September, 1886, and the Crown had then demanded from the County Judge or County Attorney all fines, penalties, and forfeitures imposed under the Canada Temperance Act, which had been paid to him under the order in council of the 29th September, 1886, what defence could have been set up to such demand, in the absence of any application by him thereof, or of any liability incurred by him in respect thereof? and in what respect would the position of the County Judge or of the County Attorney in such case differ from that of the treasurer in this? The position of one would be no different from that of the other, and neither would have any defence to such a demand.

The passing of the order in council of the 15th November, 1886, was a complete revocation of the order in council of the 29th September, 1886, and all the fines, penalties, and forfeitures imposed under the Canada Temperance Act, which had been paid to the treasurer of the united counties of Leeds and Grenville under the order in council of the 29th September, 1886, became and were as much subject to the provisions of the order in council of the 15th November, 1886, as they would have been had they still remained in the hands of the parties who imposed and recovered them.

The order in council of the 15th November, 1886, is clearly retroactive in this sense, that it provides for the application of all fines, penalties, and forfeitures which had theretofore been recovered or imposed under the Canada Temperance Act.

In my opinion, the sum of \$750 in dispute does not belong to the plaintiffs but to the defendants; and this was the broad question submitted for our decision.

No technical question of parties or pleadings was raised

before us, and had it been, we would have found a method of obviating it, but only the broad question above stated.

Judgment.

In my opinion, the motion must be dismissed with costs.

ARMOUR,
C.J.

I refer to *Scott v. Porcher*, 3 Merivale 652; *Alexander v. Duke of Wellington*, 2 Russ. & Myl. 25.

STREET, J. :—

(After stating the facts.) The corporation of these united counties, being then a municipal authority liable under the provisions of 44 Vic. ch. 27, sec. 34, to contribute towards the expense of administering the provisions of the Canada Temperance Act, were clearly a municipal authority to whom the Governor in Council might lawfully, under 49 Vic. ch. 48, sec. 2, (D.) direct the payment of the fines recovered within the county under the provisions of the Canada Temperance Act.

Then the order in council itself, being duly authorized by statute, clearly applies to these united counties, for they were counties which had adopted the Canada Temperance Act, and the treasurer of the united counties became entitled to receive the fines imposed under that Act, anywhere within the united counties. Under this order in council the county treasurer, amongst other sums, received from the Police Magistrate of the town of Brockville a sum of \$750, which was made up of fines imposed under the Canada Temperance Act and collected by him in the town of Brockville.

It is argued that the treasurer received it subject to a trust that it was to be applied by the county council for the purposes of the Act; or that the county council were in fact constituted merely the paymasters of the government for those purposes, of the money paid to them.

I do not think that the circumstances here support either of these positions. It cannot be that the money received by the county treasurer for the corporation was held by the corporation upon a trust, because it is essential to a trust, not only that there should be a trustee but

Judgment. a *cestui que trust*, and here there is none. The other suggestion is broadly this, that the corporation were to be the agents of the Dominion Government for the application of the money. The language of the Act and of the order in council does not support such a construction; the order in council plainly confers upon the corporation an absolute discretion in the application of the money, limited only by the expression that it is paid to them "for the purposes of the Act." Their disposition of it is to be their own disposition and not that of the Government, and there does not seem to me to be any liability on the part of the corporation to render an account to the Government of their disposition of the money. I can gather no such intention from the terms in which the order in council is framed; and as against a public body such as this corporation, I do not think such an intention should be presumed without something to support the presumption. The delivery to them of this money seems to me to be therefore lacking in the essential qualities of an agency or bailment or mandate, all of which imply that the person to whom goods or money is delivered is to do some act for the person delivering the goods, and a liability to account. Here, on the contrary, the intention of the Government, as I gather it from the Act and the order in council, was to relieve itself from responsibility for the money handed over to the municipalities by throwing upon them the duty of properly applying it. I think the order in council here operated as a gift from the Crown to the municipality, with an intimation added as to the purpose to which it was expected the gift would be applied, but carrying with it no legal obligation on the part of the municipality to the Crown that it should be applied in any particular manner. If a gift is made to a man for the purpose of enabling him to go to Paris for his own pleasure, and he choose to go to London instead, can the donor, who sustains no damage, recover back his money? If this was a gift at all, it was a complete gift; the money was finally at home, so far as the Crown was concerned, when the

municipality received it: and the revocation of the order in council could not revoke a completed transaction, nor retract that which had been actually done under it.

Judgment.
STREET, J.

No ratepayer of the county could compel the corporation to apply this money to any particular purpose. Whether a ratepayer could restrain them from applying it to a totally different purpose, might be a question, but it is one which does not arise here. The money when received from the Crown became the property of the corporation; they ceased to be answerable to the Crown for it, in my opinion, and were answerable only to the ratepayers of the county for their proper application of it along with the other funds under their control.

After this sum of \$750 had been paid to the plaintiffs, a second order in council was passed on 15th November, 1886, by which it is provided "that the order in council of 29th September, 1886, relating to the application of fines and penalties imposed under the said Act, (49 Vic. ch. 48, D.) be and the same is hereby cancelled, and that all fines, penalties, or forfeitures recovered or enforced under the Canada Temperance Act, 1878, and amendments thereto, within any city or county or *any incorporated town separated for municipal purposes from the county*, which would otherwise belong to the Crown for the public uses of Canada, be paid to the treasurer of the city, *incorporated town*, or county, as the case may be, for the purposes of the said Act." This order in council differs from that of 29th September, 1886, by the insertion in it of the words which I have underlined. Had these words been contained in the original order in council, the town of Brockville, being an incorporated town separated for municipal purposes from the county, would undoubtedly have been entitled, and the county municipality would not have been entitled, to receive the particular sum of \$750 now in dispute. The town corporation now claims to recover it from the county upon the ground that by cancelling the first order in council, the Crown has revoked everything done under it, and that the rights of the parties

Judgment. are to be treated as if the first order in council had never been passed.
STREET, J.

Had I been able to come to the conclusion that the intention of the Crown, as expressed by the order in council of 29th September, 1886, had been to create a trust or a mandate as distinguished from an actual and completed gift, I should certainly have felt pressed by the authorities to consider the disposition made of this money as one which might be revoked by the Crown at any time before the money had been actually applied to the purposes indicated in the order in council. See *Alexander v. Duke of Wellington*, 2 Russ. & Myl. 35; *Kinloch v. Secretary of State for India*, 7 App. Cas. 619; but see also *Brown v. Harris*, 13 Ves. 552. But treating the payment to the county corporation as a final disposition of the money, which left no further interest in the Crown, the decisions in *Alexander v. Duke of Wellington* and *Kinloch v. Secretary of State for India* are not applicable. The gift, having been completed by the delivery to the person intended by the Crown to receive it, free from any further control on the part of the Crown, is to be governed by the same principles as are applicable to a completed gift from one individual to another, and must be treated as not being revocable at the will of the donor.

It is unnecessary in this case to decide whether the proper course has been pursued by the Police Magistrate under the statute and order in council in paying the fines recovered by him direct to the municipal authority, and whether they should not in the first instance have been paid over to the Government, as formerly, to be dealt with by the Government under the order in council. This bounty of the Crown being revocable at any time before the actual distribution has been made, it appears to me at least doubtful whether an action would lie at the suit of the municipality against the officer to whom the fines are paid, without some special direction of the Crown to the latter to pay them over. The question, however, does not arise here, because, if the doubt which I have

suggested is well founded, the moneys which have been received by the plaintiffs are not recoverable by the defendants from them; they are moneys which are payable to the Crown, and are to be dealt with by the Crown after they have been recovered by the Crown.

Judgment.
STREET, J.

In my opinion, the demurrer should have been allowed with costs, and the judgment for the defendants should be set aside, and the judgment entered for the plaintiffs for the amount claimed with costs; and the plaintiffs should have the costs of the motion to the Divisional Court.

[CHANCERY DIVISION.]

NICHOL V. ALLENBY.

Partition—Land in different counties—Jurisdiction of Local Master—Mortgage of his share by tenant in common—Right of co-tenant to redeem—Simple contract creditor of mortgagor—Right to redeem—Damages.

Where lands are situate in different counties, a Local Master has no jurisdiction to make an order for the partition or sale thereof, and such an order and the proceedings thereunder, even as to lands within the county in which he is Master, are wholly void.

Regina v. Smith, 7 P. R. 429 followed.

Where an undivided interest in land is mortgaged by the owner thereof, a co-owner has no right of redemption.

A simple contract creditor of a mortgagee, as such, has no right to redeem.

THIS was an action for an injunction to restrain the defendant from proceeding with a foreclosure action under the following circumstances:

The action was brought by three classes of claimants against the defendant, who, as mortgagee of an undivided one-third interest in certain lands within the county of Waterloo, which with other lands in the county of Oxford, were known as "*The Bucknall Estate*," to restrain defendant from further proceeding with a mortgage action in the Queen's Bench Division, against John Bucknall and Sophia

Statement Bucknall, in which he sought to foreclose their equity of redemption.

The property in question, *i.e.*, The Bucknall Estate, formerly belonged to one Samuel Bucknall, who died on or about 9th October, 1881. and by devise three of the sons of the deceased, viz, John Bucknall, Joshua Bucknall, and William Bucknall, became owners in fee, as tenants in common.

Afterwards, and before the 3rd day of September, 1888, Joshua and William conveyed their undivided two-third shares to the plaintiff, Fawkes.

In the action of this defendant against John Bucknall and Sophia Bucknall, the master made his report on 27th April, A.D. 1888, and having found that the sum of \$1,865 85 was due to the plaintiff therein, on his mortgage security, appointed that sum to be paid with six months' interest.

Afterwards, on the 3rd September, 1888, on the application of the plaintiff Fawkes, in the presence of the solicitors for the defendants (John Bucknall and Sophia Bucknall), the local master for the county of Waterloo made the usual order for the partition or sale of the lands and premises, and for the adjustment of the rights of all parties interested therein.

Whereupon such proceedings were had under the said order, that the local master put up the said lands for sale on the 25th September, 1888.

The property was put up in three separate parcels—
No. 1. The lands in the county of Waterloo; No 2
The lands in the counties of Waterloo and Oxford; No
3. The lands in Waterloo.

At the sale the plaintiff Nichol became the purchaser of parcel No. 3, and John Bucknall of parcels Nos. 1 and 2. The conditions of sale were, that five per cent. of the purchase money was to be paid down, and the balance within thirty days from date of sale without interest. Nichol paid the five per cent. as required, and the master, on the 17th October, 1888, made his report on sale.

It was alleged that Nichol wished to complete his pur-

chase, but that he had not yet accepted the title, nor paid Statement. the balance of his purchase money, and that John Bucknall refused to complete his purchases.

The plaintiffs, Fletcher and Wallace, were simple contract creditors of John Bucknall, for the sum of \$342.93, being the amount of a bill for services, etc., as solicitors of said John Bucknall, and for which they had not obtained judgment.

On the 23rd day of October, 1888, the plaintiff Wallace tendered to the defendant the full amount of his mortgage money, interest and costs due up to the 27th October, as shown by foreclosure decree obtained by said defendant against said John Bucknall in April, 1888.

The plaintiff Fletcher also stated in an affidavit, filed on this application, that an arrangement had been made between John Bucknall and his firm (Fletcher & Wallace), by which the latter were to procure a purchaser of the undivided shares of Joshua and William Bucknall, in the lands aforesaid in which the three brothers were tenants in common, for the benefit of John Bucknall, he being desirous of owning the whole property, and it was in carrying out this arrangement that the plaintiff, Fawkes, became the purchaser of the two undivided shares of Joshua and William, but that John, after the purchase by Fawkes, repudiated the arrangement, which necessitated the proceedings by Fawkes, in partition; but, in no way, had the defendant Allenby anything to do with this, nor was he affected thereby.

The plaintiffs brought this action on the 24th day of October, 1888, and on the twenty-fifth day of that month, an *interim* injunction was granted, and on its return, by consent of all parties, it was agreed that the final disposition of the action should be determined by the learned Judge without waiting for the formal trial.

The motion was argued on November 27th, 1888.

Bain, Q.C., for defendant, filed in answer to the material filed by plaintiffs, an affidavit of defendant, in which

Argument.

he stated *inter alia* that he had no knowledge of the arrangements referred to by plaintiff, Fletcher, in his affidavit, between Fletcher and Wallace and Fawkes, or between them or any of them and John Bucknall: that he had never been in possession of the mortgaged premises, nor in receipt of the rents, etc.: nor had he been paid any sum whatever on account of his judgment: that he believed John Bucknall was acting under legal advice, holding and intending to hold possession of the whole of the lands, both in Waterloo and Oxford, adversely to the plaintiffs, and that he (Bucknall) repudiated their dealings with the said lands, and also the alleged sale to plaintiff Nichol, under the partition proceedings: that he (defendant) was not made a party to the partition proceedings, nor had he any knowledge thereof, or of the lands having been sold, till he casually heard that such sale had taken place, and from enquiries made, he believed the proceedings in partition were irregular; that Nichol had not paid his purchase money into Court, nor taken the proper course to obtain title, etc.; that he (defendant) was not in any way bound by the partition proceedings, nor the alleged sale to plaintiff Nichol—that he had never seen any deeds, agreements, or other papers, showing any right on the part of plaintiff, Nichol, or any of the plaintiffs to redeem, nor had evidence of such been offered to him; that the plaintiff, Wallace, distinctly admitted to him that the object of plaintiffs was to procure an assignment of his mortgage and the benefit of his foreclosure proceedings, and that under cover thereof, the plaintiff, Fawkes, could then get a final order of foreclosure against John Bucknall, of the said one undivided share in the mortgaged lands, and acquire a title to the lands sold to Nichol and to eject Bucknall and give possession to Nichol in case he desired to complete his purchase: that on 23rd October, plaintiff, Wallace, tendered to him the amount found due to him on the foreclosure judgment, but he accompanied such tender with a condition, that he, defendant, should assign his mortgage and the judgment foreclosure proceedings, and at the same time delivered a letter from his Toronto solicitors, as containing

the terms on which the said money was offered, but he did not say upon whose behalf the tender was made, or to which of the plaintiffs he required the assignment, nor did he submit any documents, or evidence whatever showing any right or title in any of plaintiffs to same, or to any undivided interest covered by said mortgage or any part thereof, save and except what appeared in the said letter: nor did he, when he offered the money, tender any assignment, etc.; that he, defendant, therefore declined to accept the money on the terms mentioned; but offered to accept same and give a release, which he, Wallace, refused, etc. He also denied that John Bucknall had no other property, out of which plaintiffs, Fletcher and Wallace, could make their claim, on the contrary he alleged that he had cattle and farm stock, and an undivided one-third interest in the Oxford property, which was worth \$1,500.

Argument.

J Hoskin, Q. C., and *W. Nesbitt*, in reply, read two affidavits made by plaintiffs Fletcher and Wallace, respectively, explaining and denying certain statements made by defendant in his affidavit, but which did not affect the result.

Bain also took the following objections:

1. The partition proceedings were void *ab initio*. The order was made by a local master who had no jurisdiction, where the lands sought to be affected by the proceeding lie in different counties, or in a county other than that in which the local master had jurisdiction, and the plaintiff, Nichol, was not entitled to redeem for the reason that the proceedings under which he became a purchaser were void *ab initio*.

2. Supposing the partition proceedings were not void, etc., the plaintiff Nichol had not, as yet, a legal title to the lands purchased by him, nor had he accepted the title, and not having completed his purchase, he had no right to redeem.

3. The plaintiff Fawkes had no right to redeem: that, admitting him to be a tenant in common, with John Bucknall, he had no interest in the latter's share, and his

Argument.

Fawkes', two-third interest was not affected by the mortgage; that after foreclosure the mortgagee would stand as co-tenant in common, in the place of John Bucknall, who had now only the right to redeem in equity. That one co-tenant can only redeem where his interest has been mortgaged by a previous owner of the whole, or by the whole of the tenants in common.

4. As to the plaintiffs, Fletcher and Wallace they were merely simple contract creditors, and had no lien, charge, or incumbrance on Bucknall's equity of redemption, and were therefore not entitled to redeem.

5. The tender was not sufficient; or being accompanied with the condition that defendant should make an assignment of his said mortgage, and all his foreclosure proceedings, was not a proper tender, and it was made only on behalf of Nichol, who, for the reasons stated in objection No. 1, was not entitled to redeem; and if intended to be made on behalf of any of the other plaintiffs, it was not stated in distinct terms to which of them, and, in fact what took place on the occasion of the alleged tender, was more in the nature of an endeavour to negotiate for an assignment of the mortgage and foreclosure proceedings, than as a specific tender; and, moreover, that the alleged tender was not accompanied by any evidence of title which would give the plaintiffs or any of them a right to redeem.

And he cited in support of these several objections: Ch. Gen. Order, 640; *Re Bailey's Trusts*, 17 W. R. 393; *Earl of Cork v. Russell*, L. R. 13 Eq. 210; Coote on Mortgages, 4th ed., 1006-1014; Seton on Decrees, last ed., 1051-1052; *Bates v. Martin*, 12 Gr. 490. The mortgagee has a right to refuse to take his mortgage money from anyone, except the party entitled to the equity of redemption: *James v. Biou*, 3 Swan. 237 and 241. If Fletcher and Wallace are allowed to redeem, any other subsequent creditor could do so.

Hoskin, Q.C., and Nesbitt, contra. This application is made on the authority of *Pearce v. Morris*, L. R. 5 Ch. 227. The Court will decree that plaintiff should redeem,

he being a creditor, after a foreclosure decree : *Soley v. Salisbury*, 9 Mod. R. 153 : also reported, 2 Eq. cases Abr. 600. A surety who covenanted to pay interest only on a mortgage in case the mortgagor makes default, has a right to redeem, etc. : *Green v. Wynn*, L. R. 4 Ch. 204. As to the partition proceedings :—although the land is in two counties, as to the lands in Waterloo, they are good. Defendant at all events not being a party has no right to object. They also cited, in support of the plaintiffs Fetcher and Wallace, as simple contract creditors, that they have a right to redeem, the same as if they were subsequent encumbrancers : *Rhodes v. Buckland*, 16 Beav. 212. As to purchasers' right to redeem : *Fawcett v. Fothergill*, Dickens' Rep. 19. As to Fawkes's right as tenant in common : *Bentley v. Bates*, 4 Y. & C. Ex. 182. As to Nichol's right as purchaser : *Christian v. Field*, 2 Ha. 177. An agreement to purchase gives the purchaser a right to insure as owner ergo, he has such an interest as entitles him to redeem : *Laidlaw v. Liverpool and London, etc., Ins. Co.*, 13 Gr. 377. *Castellain v. Preston*, 11 Q. B. D. 380.

January 9, 1889. ROBERTSON J. :—

The plaintiffs represent three different classes of interests in the lands in the defendant's mortgage described, or more properly speaking, they each claim to have a separate and distinct interest therein. Whether this is the case, as regards the whole of them, it is necessary to consider as it is conceded, unless they, or some of them, have such an interest which will entitle them, or some or one of them to redeem, this action must fail.

The plaintiff Nichol's claim is based on an agreement to purchase at the sale made under the order for partition or sale of the lands belonging to the Bucknall estate, in which, at the time, the plaintiff Fawkes was the owner in fee simple of an undivided two-thirds, and John Bucknall, of an undivided one-third part, subject to the mortgage to the defendant Allenby, whose action for the fore-

Judgment. closure of the equity of redemption of John and Sophia
ROBERTSON, J. Bucknall, his wife, this action is brought to restrain.

The plaintiff Fawkes' claim is based on his right as a tenant in common.

The plaintiffs, Fletcher and Wallace, are simple contract creditors of John Bucknall, not having at the time these proceedings were commenced recovered a judgment, and therefore not having any writ which would attach or be a lien on this equity of redemption in the hands of the sheriff.

The first objection taken by Mr. Bain goes to the right of Nichol as purchaser. The order 640 of the Court of Chancery, prior to the Ontario Judicature Act, 1881, now in force, and under and by authority of which the order of the local master for the partition or sale of the Bucknall estate lands was assumed to be made, enables any adult person who has heretofore been entitled to a decree or order for the partition of an estate, on giving the notice required thereby to apply to the presiding Judge in Chambers, or to the master in the County, (other than in the County of York) wherein the land sought to be affected by the proceeding lies, for an order for the partition or sale of the premises in question; whereupon such Judge or master may make such order for partition or sale, etc. Then following this is order 641, which declares, that "when after an order has been made under order 640 lands are discovered in another County, an application may be made to a Judge in Chambers for the partition or sale of such lands under the order formerly made, and where two or more orders have been made by masters in different counties, an application may be made in Chambers for an order as to the conduct of the future proceedings."

Mr. Holmsted in his work on these orders at p. 370, says: "Where the lands are situated in the county of York, or in more counties than one, the application for partition should be made to a Judge in Chambers."

In Re Arnott, Chatterton v. Chatterton, 8 P. R. 39 Judgment.
Proudfoot, V. C. held that where special circumstances ROBBETSON, J. are shown on an application for partition, a reference to the master, other than the master in the county town of the county where the lands are situate, may be directed, but the application should be made to a Judge in Chambers. In that case the lands sought to be affected were in Northumberland, but contiguous to the town of Whitby, the county town of the county of Ontario, and the application was made to have the reference to the master at Whitby, instead of Cobourg, the county town of the county where the lands lay on the grounds that being near Whitby, a reference to the master there would be much less expensive and more convenient for all parties than a reference to Cobourg.

In 1878, under sec. 35, A. J. Act, 1873, it was held the referee had no jurisdiction to make an order referring it to the master, to determine whether a conveyance made by a judgment debtor is fraudulent. The words of the Act are "the Court or a Judge in Chambers." The general order then in force or in force at the time of the passing of the Act, gave the referee power to transact any such business, as, by virtue of any statute, is done by a Judge sitting in Chambers, except in certain enumerated cases. In that case the referee made the order, and on appeal from the report of the master, the objection was taken that the referee had no jurisdiction to make the order directing the reference. The late Chancellor Spragge refused to hear the appeal, declaring that the Act gave no jurisdiction to the referee; that consequently all proceedings had under it were null and void: *Queen v. Smith*, 7 P. R., 429.

Whatever jurisdiction the local master has is conferred upon him by order 640—reading which, in connection with order 641, it is clear that if the lands sought to be affected lie in more counties than one, the jurisdiction of the local master does not attach. The master in each County might have jurisdiction as to the lands in his County; but the object of the order is to prevent more

Judgment. than one suit being brought, in respect to the same estate,
ROBERTSON, J. and if by any chance more than one order is made, the
several suits would consolidated.

I cannot bring my mind to the conclusion as contended for by Mr. Hoskin, that although the order under consideration in this case was void as to the lands in Oxford; it was good as to the lands in Waterloo.

In and by the same order the master has exceeded his jurisdiction, and he has continued that excess of jurisdiction to the sale of the lands: he has sold not only the lands in Waterloo, but in Oxford. I am clearly of opinion, therefore, that on principle and authority, as said by the late Chancellor in *Queen v. Smith, supra*, the master having no jurisdiction to make the order for partition, all proceedings under it are null and void.

This disposes of the case so far as the plaintiff Nichol is concerned, for the reason that his purchase at the sale of the lands described in the report on sale, as parcel No. 3, is null and void; consequently he has no interest in the land or in the equity of redemption in the undivided one-third share on which the defendant holds the mortgage, and the case of *Pearce v. Morris*, L. R. 5 Ch. 227, cited by Mr. Hoskin, does not apply. There the plaintiff had not accepted the title at the time of filing his bill, but did so afterwards, and besides the mortgagee in that case accepted the money, but he declined to convey to the plaintiff the legal estate in the mortgaged property and deliver up the title deeds. Here, the sale being null and void, the mortgagor was, as regards his rights as entitled to the equity of redemption, in no way affected by the sale to Nichol, and so far as Nichol was concerned, he was not in a position either to tender the money or demand an assignment of the mortgage and the proceedings in the foreclosure suit. I have assumed thus far that the sale being void, Nichol would not complete the purchase. And, I think, notwithstanding Mr. Hoskin's objection or contention, that although this defendant is not a party to the partition proceedings, he has the right to take the objection; it is true he takes the

risk of the consequences of his refusal to accept the tender. Judgment. As said by Lord Hatherley, L.C., in *Pearce v. Morris*, at p. 231, "The mortgagee is himself in considerable peril if he refuses to accept payment, and I am not saying whether he would or would not be entitled absolutely to refuse in such a case; but if he did so, and it turned out that the person tendering the money was entitled to redeem, then the interest on the mortgage would at once be stopped. It might turn out, of course, that the person who had entered into this contract might, finally, not become the owner of the estate, because the contract might go off; * * But whether he is entitled to have a conveyance, and to have the deeds delivered up until his title is completed, is quite another matter." Now here, this title to the plaintiff Nichol cannot be perfected, and the defendant had a perfect right, in my judgment to take the risk of not accepting the tender: suppose he had done so, and afterwards the mortgagor, on the day appointed, paid the amount found due by the master into the bank, and demanded a discharge of the mortgage as he would have a right to do; what position would the defendant be in? It would not avail him then to say that Nichol had paid the money, and he had assigned to him; because Nichol had no *locus standi*.

This disposes of the first and second objections, in favour of the contention of the defendant, and I am therefore of opinion, that as regards the plaintiff Nichol, the action must be dismissed.

The third objection is as to plaintiff Fawkes, who is a tenant in common of an undivided two-thirds interest in the whole Bucknall Estate Farm, but has no interest in the equity of redemption which appertains to the one-third interest of his co-tenant John Bucknall. And the question is: Has he the right to redeem that one-third interest? In *Fisher on Mortgages*, 4th ed., at p. 707, sec. 1180, it is said: "If the equity of redemption be the property of several persons, as joint tenants or tenants in common, one of them may return, each as against an encumbrancer, and subject to account with his co-tenant being entitled to pos-

Judgment. session of the whole of the rents. But it seems that one
ROBERTSON, J. cannot redeem his own moiety only, for this would be directly contrary to the principle that a mortgage is to be redeemed entirely or not at all." And he cites *Wynne v. Styan*, 2 Ph. at p. 306, in support of this doctrine, and I find in the head-note the following as being a digest of the decision on this point. "Where a mortgagee is also tenant for life of the mortgaged estate, the Statute of Limitations does not begin to run against the mortgage title until his death, and the same rule applies where the mortgagee is a tenant in common with others of the mortgaged estate." Now, how does this help the plaintiff, Fawkes? The equity of redemption in this case is in John Bucknall only, he only created the mortgage, and on his undivided one-third share; the plaintiff Fawkes is not therefore entitled to redeem because the equity of redemption in the property mortgaged, viz., John Nichol's undivided one-third share is not the property of him and John Bucknall as tenants in common. In *Wynne v. Styan*, *supra*, the mortgage was created by the deceased Mrs. Wynne, who died in 1811, by an indenture dated in 1802, for securing to her sister Elizabeth, £5,000. The mortgaged estate was afterwards devised by Mrs. Wynne to her two sisters Margaret and Elizabeth (the latter being the mortgagee), for their joint lives and the life of the survivor with remainder to the defendant M. Styan, with remainder to the defendant J. Styan, with other remainders over. Now the mortgage was created by the owner of the whole estate, not a mere tenant in common, but after creating the mortgage she devised the estate to the mortgagee and another, sisters, as tenants in common for life; both the mortgagee and her co-tenant Margaret having died, years after the death of the mortgagor who was the testatrix and deviser, the executor and residuary legatee of Margaret, the co-tenant of the mortgagee, then as plaintiff commenced the suit to enforce this mortgage against the remaindermen. So that this case is no authority in favour of the plaintiff Fawkes. If it had been that Samuel Bucknall, the original owner

and predecessor in title of his three sons before named, ^{Judgment.} had in his lifetime created a mortgage on the whole property, as was done by Mrs. Wynne, when she was owner of the whole estate, then I have no doubt anyone of the subsequent tenants in common could redeem, but he would have to redeem the whole, and not his own moiety only, subject of course, to his right to look to his co-tenants for their respective shares of the mortgage money: and *Bentley v. Bates*, 4 Y. & C. Ex. 182, is an authority for the mortgagee of the share of one tenant in common to maintain a bill for an account, against the mortgagor and his co-tenants in common, nothing more. The general principle is that no person is entitled to redeem, but he who can show a title to the estate of the mortgagor: *Lomax v. Bird*, 1 Vern. 182; *James v. Biou*, 3 Swan. at p. 237. In the latter case, Lord Chancellor Eldon said: "It is extremely clear that a mortgagee may retain possession of the estate until he is paid, and that no one has a right to make a tender of the money due, except the party entitled to the equity of redemption; against all other persons the estate is the property of the mortgagee; a party coming to redeem a mortgaged estate, must prove at his own cost that he is the individual entitled to the equity of redemption. Now what is the estate of the mortgagor in this case? The answer is plain, it is the undivided one-third share of John Bucknall, not the two undivided third shares of the plaintiff Fawkes; the latter are not mortgaged at all, they are free and clear, and not in any way incumbered by the defendant's mortgage. Suppose John Bucknall had not mortgaged, but had declared his intention of selling his undivided third share, could Fawkes prevent him doing so, or would he have the right to say, if you sell, you shall sell to me, and me only? I think not. After considering all the authorities cited and others, I am of opinion that the plaintiff Fawkes has no right to redeem, and as regards him the action must also be dismissed.

The fourth objection is as to the plaintiffs Fletcher and Wallace, who are simple contract creditors. I have carefully

Judgment. considered the cases cited on behalf of the plaintiffs; all of
ROBERTSON, J. which are of very ancient date, and refer to a state of things in no way parallel to the facts and circumstances under which these plaintiffs are seeking their remedy. I was somewhat surprised at the contention on their behalf, but owing to the ability with which their views were put forth by Mr. Hoskin and Mr. Nesbitt, I felt it incumbent upon me to read and consider with some care the citations made by them—not one of which is to decisions in our own courts, or to any late case in the courts of the mother country, a circumstance which leads one to the irresistible conclusion, that Messrs. Fletcher and Wallace have the honour of being in the front rank, seeking to induce, that “long arm of the Court of Chancery,” which was so eloquently and so earnestly invoked on their behalf, to reach forth several fingers lengths further than it has ever heretofore found itself able to go. If the contention of these plaintiffs is correct, then I cannot see where or when foreclosure proceedings are to come to an end. Every creditor of a mortgagor, whether he has any interest in the equity of redemption or not, up to and until the final order for foreclosure is made, would have the right to ask the Court to come to his aid in staying proceedings: so that after these plaintiffs would be allowed to come in, Mr. Smith, or Mr. Jones, or any other person having a money demand against the mortgagor could do the same, and there would be no end to the proceedings as long as a creditor was in existence, because the mortgagor would, in each case, be entitled to further time to redeem, etc. I cannot do otherwise, therefore, than to conclude that as regards the plaintiffs Fletcher and Wallace the action must also be dismissed.

Another point, too, occurred to me in considering this matter, in regard to the partition proceedings, which, however, I must not be presumed to pass any opinion upon; but I throw it out as a hint, in my judgment worthy of consideration, and it is this: Should not the defendant in this action have been made a party in these proceedings?

The mortgager Bucknall had parted with the legal estate Judgment.
held by him in the undivided third part of the land when ROBERTSON, J.
he mortgaged it to the defendant, and all he had left was
his right to redeem; if he, therefore, was a necessary
party; does it not follow, or is it not more certain that he
who held the legal estate, should have been heard in this
matter? I merely throw out the suggestion for what it
may be worth.

The defendant claims damages; he was entitled to an
order for foreclosure, immediately after the day appointed
by the master for the payment of the amount found due by
him on the mortgage, and for subsequent interest and
costs of the foreclosure action: default being made by the
mortgagor. By the action of these plaintiffs he has been re-
strained from making his application to bring his action to
a final close, and he has therefore, been prevented from
taking possession of the lands in question therein. The
plaintiffs on obtaining the interim injunction undertook
to abide by any order as to damages, which the Court
might make, in case it should be of opinion that the
defendant should have sustained any by reason of the
order. I think the defendant has sustained damages, and
I think the plaintiffs should pay such. I cannot add them
to his mortgage debt, because the mortgagor is in no way
liable for those proceedings; and I think a fair and
reasonable guide will be, interest on the amount found due
by the master, to be paid on the 27th day of October last
according to his report. This sum is \$1,921.82 interest on
which, at 6 per cent. per annum, from the 27th October,
1888, up to and inclusive of this 9th January, 1889, amounts
to the sum of \$23.36, which sum I order judgment to
be entered for against the plaintiffs with costs of the
action.

I have not fully considered the question of tender also
raised by the defendant as it has become unnecessary to do
so, but I may say that, so far as I have considered it, that
tender was made on behalf of the plaintiff Nichol only,
but whether the condition attached to it was such a one

Judgment. as the plaintiff had a right to attach, has not been considered by me.

ROBERTSON, J.

The action is therefore dismissed with costs, and damages assessed to the defendant at the sum of \$23.36, and the injunction dissolved.

G. A. B.

[CHANCERY DIVISION.]

GIBBONS V. WILSON.

Fraudulent preference—Present actual bond fide advance of money—Chattel Mortgage—Assignment for creditors—R. S. O., cap. 124, sec. 3—Principal and agent.

An insolvent debtor was taken by one of his creditors to the latter's solicitor and then it was arranged that the solicitor should procure some one to lend the insolvent \$600 on his stock in trade, the solicitor at the same time taking from the insolvent a written authority to pay the claim of the said creditor out of the moneys advanced. The solicitor accordingly got defendant to lend the money on a chattel mortgage of the stock in trade, without however, letting him know anything about the insolvent's circumstances or why the money was wanted, or how it was to be applied. Out of the money the solicitor paid off the creditor in full. The insolvent afterwards made an assignment for the benefit of his creditors to plaintiff, who brought this action to set aside the chattel mortgage.

Held, that the action must be dismissed, for the mortgage in question was made in consideration of a present actual *bond fide* advance of money within the meaning of R. S. O. c. 124, s. 3, nor (per Ferguson J.) could it be said that the 'effect of the mortgage' was to prefer the creditor, for this was the effect solely of the act of the solicitor, acting apparently altogether for another principal.

The rule is that the fraudulent act of an agent does not bind the principal unless it is done for the benefit of the principal, or unless the principal knows of or assents to it, or takes an advantage by reason of it.

THIS was a motion to the Divisional Court by way of appeal from the judgment of MACMAHON, J., at the trial of this action, which was brought for the purpose of setting aside a chattel mortgage under the circumstances fully set out in the judgments below.

The action was tried at Goderich, on March 4th, 1888.

The present motion came on for argument on June 16th, 1888, before FERGUSON, and ROBERTSON, JJ.

Moss, Q. C., for the plaintiff. It was for the defendant **Argument.** to show that the \$600 bore a fair relative value to the consideration, the property transferred. The onus rested upon him to show that the transaction was *bond fide*, and he failed to do so: *River Stave Co. v. Sill*, 12 O. R. 557; R. S. O. 1887, ch. 124; *Ex parte Chaplin*, 26 Ch. D. 319; *Bott v. Smith*, 21 Bea. 511; *Brown v. Sweet*, 7 A. R. 725; *Rice v. Bryant*, 4 A. R. 542; *Morton v. Nihan*, 5 A. R. 20; *Merchants' Bank v. Clarke*, 18 Gr. 594.

Walker for the defendant. Section 3 of R. S. O. 1887, c. 124, does not apply when the transfer is a mortgage: *Goulding v. Deeming*, 15 O. R. 201. The plaintiff's whole case depends upon the imported knowledge: *Building and Loan Association v. Palmer*, 12 O. R. 1.

Moss, in reply, cited *McDonald v. McCall*, 9 O. R. 185; *Jones v. Gordon*, 2 App. Cas. 616; *Re Gomersall*, 1 Ch. D. 137; *Kettlewell v. Watson*, 21 Ch. D. 685.

January 8th, 1889. FERGUSON, J.:—

The action is to set aside a chattel mortgage for the sum of \$600, made by one Clarke in favor of the defendant, upon a store of goods then belonging to Clarke, including the goods thereafter to be brought into the store by Clarke. The mortgage bears date February 7th, 1888.

The plaintiff is the sheriff of the County of Huron, to whom Clarke subsequently made an assignment under the provisions of the statute. The trial took place before my brother MacMahon on the 4th of May last, at Goderich, and was without a jury. The action was dismissed with costs.

The reasons for the learned Judge's conclusion seem to have been that the whole sum of \$600 was advanced by the defendant on the security of the mortgage *bond fide* and without any notice or knowledge that Clarke was unable to pay his creditors in full or that he intended to give the firm of Stewart & Son, the creditors mentioned in the pleadings, a preference over his other creditors, or that

Judgment. Clarke intended to defeat, hinder, or delay his other creditors. FERGUSON, J. itors.

Clarke was a merchant carrying on his business at Seaforth in the county of Huron. He had been in this business for several years. He became embarrassed and was pressed by some of his creditors for payment, and it appears that he was threatened with actions by some of these. He went to his brother at Woodstock hoping to get some money from him to apply in ease of his position, but was disappointed in this. He then went to Messrs. Stewart & Son, of Hamilton, who were amongst his largest creditors and, as he says, with the view or object of making in their favor a mortgage upon his goods, etc., he thinking that such a mortgage would have the effect of saving the goods for the time being, from his other creditors, and that this would give him an opportunity to make a "turn" or do something in his business that would enable him to pay all his debts. Such seems to be shortly his description of his objects and intentions, when he visited that firm. The mortgage that he contemplated making was not, however, made. What passed between him and that firm, was given, or in part given in evidence, but subject to objection and upon the undertaking of counsel to connect it with the defendant which does not appear to have been done, and it appears to me that what was said at the interview between Clarke and that firm cannot be used against the defendant. It does not appear to me, however, of so great importance as to deserve the stress that was apparently laid upon it by counsel at the trial.

A member of, or some one connected with, the firm of Stewart & Son, went with Clarke to the solicitors of the firm. They saw one of these solicitors, Mr. Scott. After some conversation with him, Mr. Scott, according to Clarke's evidence, said there was a person in town who could raise him (Clarke) some money to apply on his accounts or give his creditors, and that he would go out and see him, that he did go out, but returned after a few

minutes saying that this person was not at home, but he ^{Judgment.} thought it would be all right, that he asked him (Clarke) ^{FERGUSON, J} how much money he needed, and being answered about \$600, he (Scott) went on and drew the mortgage which was executed by Clarke.

The mortgage bears interest at 9 per cent. per annum. The money is payable in monthly instalments of \$100 each. There is a provision in the mortgage that in default of payment of any of the money the whole should fall due.

From Clarke's evidence it appears that his leading or most important idea in making the transaction, was to have a mortgage on the property for the purpose of warding off his creditors for a time so that he could go on with his business, he it appears, thinking that a mortgage would have this effect. See the evidence p. 16 particularly. He says he gave Scott a statement of his affairs at the time, which I understand to be a verbal statement.

There is no doubt that the defendant advanced upon the mortgage the whole of the money, the \$600, at the time the document was executed and delivered to him. Clarke signed an order or direction as to the application of the money, and left it with Scott. Of this, however, the mortgagee, the defendant, had personally no notice or knowledge. Pursuant to this direction \$484 of the money was paid to Stewart & Son, this being the whole amount of their claim against Clarke. \$100 was paid to the same firm for goods purchased from them by Clarke immediately after the making of the mortgage, and the remaining \$16, went to pay the costs of the mortgage (the conveyancing).

Clarke is asked : "Who was it suggested paying all the money over to Stewart & Son, or was that part of the original idea?" and he answers "I couldn't say, I did not think much about it at the time" and further on he says "I thought if a mortgage was on I could go ahead with my business."

The firm of which Scott was a member were the solicitors of Messrs. Stewart & Son. They were strangers to Clarke, and if the statement of his affairs made by Clarke to

Judgment. Scott was such, or nearly such a one as his evidence shows FERGUSON, J. he made at the time of the assignment to the plaintiff on the 18th of March afterwards, it seems strange that the loan of \$600 should have been made as it was. There is, however, no pretense that there was, on the part of the mortgagee, personally, any fraudulent intent, or intent to prefer any creditor of Clarke, or to be preferred (for he was not a creditor of Clarke at all) or any knowledge or notice of any such intent on the part of Clarke, or that Clarke had the idea that he says he had respecting the mortgage being a protection to his goods for the time being. It is not shown that there was any contrivance or scheme, or plan, between Stewart & Son and the defendant personally, to defraud, hinder, defeat, or delay the creditors of Clarke, or any of them, or to prefer any one to another or other of them by the raising of this money in the manner in which it was raised, and paying it as it was paid.

These are the facts: that the loan was made through Scott the agent of the mortgagee, for the purpose of lending his money, and it is said that Scott had from him very full powers as such agent for this purpose, that the firm of solicitors of which Scott was a member were the solicitors of Stewart & Son, that some one representing Stewart & Son, brought Clarke to the office of Scott's firm, and that the money when advanced by the defendant was applied as before stated, and to these may be added the fact that Clarke, according to his own evidence, appears to have been careless as to the application to be made of the money, so that it went in diminution of his indebtedness, or for the purchase of more goods, and that he, Clarke, was at the time unable to pay his debts in full.

The plaintiff charges that no money was advanced on this mortgage, or if any was advanced, the advance was in furtherance of a fraudulent plan or scheme between the defendant and the firm, Stewart & Son, to secure to that firm a fraudulent preference over the other creditors of Clarke upon a secret contract or understanding by that

firm with the defendant to indemnify him, the whole effect and intent of the transaction having been by all the parties thereto to secure to Stewart & Son such fraudulent preference over the other creditors of Clarke, and he asks that it should be declared that the mortgage was null, or fraudulent and void as against him as such assignee, and that it should be cancelled. Judgment.
FERGUSON, J.

Clarke in his evidence says distinctly, that he did not tell Scott that he only wanted the mortgage for the purpose of keeping off his other creditors; that Scott asked him if he thought he could go on with his business if he secured the loan, and that he told Scott that he believed he could, and that in saying this, he told Scott his honest belief at the time, and that on the faith of that the loan was made. There are some questions and answers in his evidence that when read, seem rather to detract from the full force of this part of the testimony. The learned Judge has however found that there was no notice to Scott, the solicitor, of any fraudulent intent on the part the mortgagor. Apart from this there is no pretence, nor can there be on the evidence that the defendant had personally any such notice or knowledge or that he had, himself, any such intent.

What is contended is that the defendant is liable in respect of an alleged fraud by his agent in the conduct of his business.

The alleged scheme or design is not proved except so far as the same may be conjectured, and there does not appear to be any evidence shewing the existence of the alleged secret contract for indemnity, and the defendant in his examination denies the existence of it.

Now suppose it were assumed, contrary to the view of the learned Judge, that solicitor and agent Scott was guilty of a fraud in being the instrument by and through whom, in conjunction with Clarke, the alleged preferential payment of this mortgage money was made to Stewart & Son. Would this, under all the circumstances, even assuming that a preference of the kind would offend against the Act, be binding upon the defendant?

Judgment.

FERGUSON, J. v. *English Joint Stock Bank*, L. R. 2 Ex. 259, by Mr. Justice Willes, at p. 265, is: "With respect to the question whether a principal is answerable for the act of his agent in the course of his master's business, and for his master's benefit, no sensible distinction can be drawn between the case of fraud and the case of any wrong. The general rule is that the master is answerable for every such wrong of the servant or agent as is committed in the course of their service, and for their master's benefit." This rule is adopted as the law, with unqualified approbation, by Sir Montague E. Smith in delivering the judgment of the Court in the case *Mackay v. Commercial Bank of New Brunswick*, L. R. 5 P. C. 411, 412, *et seq.*, and the words "for the master's benefit," seem to be a most important part of this rule. There are many English cases on the subject. The most important of them are referred to in the latter of the above cases. The case *Swift v. Winterbotham*, L. R. 8 Q. B. 244. seems at first to be different. It is referred to, as well as the grounds on which it (the original judgment) was reversed, and it is said to be not at all in conflict with *Barwick and the Joint Stock Bank*, L. R. 2 Ex., before mentioned. The subject has been much discussed both in England and the United States.

In the case *Condit v. Baldwin*, 21 N. Y. 219, it was held in the Court of Appeal that where an agent entrusted with money to invest at legal interest, exacted a bonus for himself as the condition for making the loan without the knowledge or authority of his principal, that this did not constitute usury in the principal, nor affect the security in his hands. There was a difference of opinion amongst the Judges. One of the reasons given for the judgment was, that the agent availed himself of his position to make a contract on his own account, and for his own benefit. An argument in the dissenting judgment was that the plaintiff loaned her money through her agent, that he was wholly and exclusively her agent because he performed no service whatever for the borrower. He performed indeed

no act which is not involved in every loan, etc., and Judgment.
further on the learned Judge said, at p. 229, "I think it material here to observe that only one contract was made which embraced the whole transaction. There was no agreement between the plaintiff through her agent and the borrower to lend \$400 at lawful interest, and then a separate and distinct agreement between the agent and the borrower for the extra \$25. It was all included in the one contract."

In *Bell v. Day*, 32 N.Y. 165, the same question came up and was decided in the same way, the majority of the Court following *Condit v. Baldwin*, the Judge who delivered the dissenting judgment (Judge Davis) said, at p. 712, "A vital error in *Condit v. Baldwin*, lies in assuming that the agent can make this contract so that the bonus will belong to him, and not enure to the benefit of his principal," after which the learned judge referred to the propositions of law going to show that the agent could not as against his principal retain that bonus.

See also *Van Wyck v. Watters*, 81 N.Y. 352, where it is said that when the agent exacts a bonus for himself as a condition for making a loan, the principal is not liable for such an unauthorized act without proof that he knew or assented to it or received a portion of the bonus. These cases seem to me to lead to the same conclusion that has been stated in the English rule to which I have referred, namely, that the fraudulent act of the agent does not bind the principal unless it is done for the benefit of the principal, or unless the principal knows of, or assents to it, or takes an advantage by reason of it.

Applying this rule to the present case, there does not seem to be any ground whatever for saying that the defendant became bound or was affected—that is, that his rights were affected—by the act of Scott, even if it is assumed that the act of paying over the money to Stewart & Son was in law, under the circumstances a fraudulent act, for it could in no sense be in any way for the benefit of the defendant who knew nothing of it, never assented to it, and could take nothing by it. There can, I think

Judgment. be no pretence for saying that it was in any way for, or
FERGUSON, J. intended for his benefit. It was a thing separate and distinct from the lending of the defendant's money, in the doing of which Scott appears to have been acting, not for the defendant, but for another principal.

It was contended that the mortgage had the effect of preferring Stewart & Son. The preference spoken of was effectuated by the other act of the agent acting apparently for another principal, namely, paying over the money after the defendant had advanced it. When the defendant advanced his money and got his security that was the end of the transaction so far as he had any concern. This did not prefer any creditor, nor did it make the estate of Clarke any less than before, because the mortgage attached upon the property to the extent of the exact sum that was advanced, nor did it cause the estate of Clarke to be less available to his creditors so far as can be seen, so as to offend against the law in this respect.

I am of the opinion that the proper conclusion is, that this mortgage was made in consideration of a then present actual *bond fide* advance of money within the meaning of section 3 of the Act, R. S. O. ch. 124, and that for the reasons stated in *Goulding v. Deeming*, 15 O. R. p. 211, the last provision of that section has no application to the case, and I think the judgment should be affirmed.

ROBERTSON, J. :—

The difficulty in the way of the plaintiff is presented in the fact that the defendant was not himself a party personally engaged in the concoction of this arrangement. If he had been, or it had been brought to his notice before he advanced the money, in my judgment there would have been no question but that, "the effect" of it would have been, under the statute, to have avoided the mortgage, but as the whole of the business was transacted by his agent, Mr. Scott, and so he (the defendant) was in entire ignorance of (what may

fairly be characterized as a scheme to prefer a creditor) Judgment.
according to the authorities referred to by my learned ROBERTSON, J.
brother Ferguson, in the judgment which he has just
delivered, I regret being forced to the conclusion, that we
cannot assist the plaintiff, although I do not hesitate to say
I have come to that conclusion with great difficulty and
hesitation, and not without very great doubt, and in
doing so I feel that we are upon the very verge of thwart-
ing the evident intention of the Legislature. It would
appear, as the law now stands, there is very little protec-
tion after all for the honest creditor against the dis-
honest debtor, and those through whom he may be
able to transact business of the very questionable
description detailed in the case now under consid-
eration ; but we are bound by authority, and to ignore
the cases referred to would be going beyond the well un-
derstood powers of this Court. And until the Legislature
goes a step further and makes the principal responsible
for all the consequences of the acts, as well as the doings
of his agent, I see nothing to prevent this "new kind of
commercial fraud" from extending, until the statutes now
in force, to obviate fraudulent transactions, are to all in-
tents and purposes nugatory. As matters now stand, the
money lender has every advantage over the honest mer-
chant who furnishes goods to his customer on credit, which
goods may be pledged by the dishonest debtor, to raise
money, after the manner accomplished by the scheme pro-
pounded in this instance, to prefer some other creditor, at
his expense. In my judgment the effect of this transaction
was to give the preference which the statute intended to
provide against, but the plaintiff having failed to bring
the knowledge of the means which were adopted to bring
it about to the mortgagee, I don't think he can succeed in
this action. It is earnestly to be hoped, therefore, that the
"wisdom of the Legislature" will be exercised in such a
way as to amend the law, in order that a stop may be put
to what must prove very disastrous to the commercial
community.

A. H. F. L.

[QUEEN'S BENCH DIVISION.]

HANDS V. LAW SOCIETY OF UPPER CANADA.

Law Society—Barrister and solicitor—Professional misconduct—Exercise of disciplinary jurisdiction by Law Society—Constitution of Discipline Committee—Evidence under oath—R. S. O. ch. 145, sec. 36.

The plaintiff was cited before the Benchers of the defendant society and charged with professional misconduct; his case was referred to the standing committee of the Benchers on discipline, which consisted of nine members and the treasurer of the society, who was an *ex officio* member of all committees; the committee reported unfavorably to the plaintiff; their report was adopted by the general body of Benchers, who resolved that the plaintiff was unworthy to practise as a solicitor, and that he be disbarred as a barrister.

Held, by a Divisional Court, reversing the decision of BOYD, C., 16 O.R. 625, (FALCONBRIDGE, J., dissenting) that the report of the Discipline Committee and the proceedings of Convocation founded upon it were irregular because of the failure to notify the treasurer (although he was absent in Europe) of the meetings of the committee, and to notify the members of the committee generally of the particular business for which they were called together; and, as the form of the notice of the meetings was not known to the plaintiff, he could not be taken to have waived any right to object.

2. That by the provisions of R. S. O. ch. 145, sec. 36, the Legislature intended that the evidence in inquiries such as the one in question should be taken upon oath; and not to confer upon the defendants a discretion to take it upon oath or without oath as they should think proper; and they could not by arrangement between themselves and the plaintiff adopt a different mode of obtaining the facts than that which the Legislature prescribed in conferring their authority upon them.

Statement.

IN this case the plaintiff moved against the judgment of BOYD, C., at the trial, reported 16 O. R. 625.

December 5, 1888. THE motion was argued before the Divisional Court (ARMOUR, C. J., FALCONBRIDGE and STREET, JJ.).

C. J. Holman, for the plaintiff. In the petition of Miss Craine, on which the proceedings of the defendants were based, it is not even charged that she employed the plaintiff in his professional capacity. He is described in it as a barrister and solicitor, but that is only a matter of addition. The petition was not verified by affidavit. The plaintiff said there was no intention of keeping the money from

Miss Craine, and restitution was in fact made by the Argument. plaintiff, according to the advice which the Benchers gave him. He did assert a lien, but he paid her notwithstanding. The offence was not a serious one. The proceeding before the Benchers was instituted hastily, as the petition was filed in two weeks from the first demand for the money. There was nothing to found the Law Society's jurisdiction—nothing to shew that Miss Craine relied on the plaintiff in his character of solicitor, or that he acted as such. The Benchers exercise a statutory authority under R. S. O. ch. 145, sec. 44, and in order to give them jurisdiction a charge must be preferred in clear and unmistakable terms. In a case like this every objection is to be relied on; *Combe v. De la Bere*, 22 Ch. D. 316.

Re Knight, 1 Bing. 91, shews that professional misconduct cannot be charged unless it occurs in the course of duty as a solicitor. *Re Hill*, L. R. 3 Q. B. 543, was the case of a solicitor's clerk. In that case *Re Blake*, 3 E. & E. 34, is referred to, where there was considerable difference of opinion expressed. See *Cordery on Solicitors*, 2nd ed. 157, 158.

The Court is entitled to look at the proceedings before the Benchers: *Rex v. Cambridge*, 8 Mod. at p. 162; and will hold a tight hand over these summary investigations by inferior tribunals: *Rex v. Corden*, 4 Burr. 2279; *Rex v. Morris*, 4 T. R. 550; *Rex v. Mason*, 2 T. R. 581; *Rex v. Osmer*, 5 East 304.

The same or greater strictness is required as in an indictment: *Fisher v. Keane*, 11 Ch. D. 353. *Marsh v. Huron College*, 27 Gr. 605, shews that the action is maintainable; and *Hedley v. Bates*, 13 Ch. D. 498, and *Essery v. Court Pride*, 2 O. R. 596, that the Court will interfere by injunction.

The Benchers, if they could take cognizance of the matter at all, were bound to make *due inquiry*: R. S. O. ch. 145, sec. 44. There is no evidence that the statute was complied with in this respect. No special notice of a meeting to consider this charge was given. At an ordinary

Argument. meeting it was brought up and sent to the Discipline Committee to make the *due inquiry*. In fairness to the plaintiff, all the ten members of the Discipline Committee should have been notified, and express notice of the business to be transacted should have been given to them. In this case the members of the Discipline Committee were never notified that the jurisdiction to try the plaintiff had been delegated to them under the statute. The three members of the committee who chanced to be present when the investigation was proceeded with, learned for the first time that the plaintiff's case had been referred to them. These proceedings were clearly irregular: *Labouchere v. Wharncliffe*, 13 Ch. D. 346, especially at pp. 352, 353; *Marsh v. Huron College*, supra; *Ree v. Faversham*, 8 T. R. 352; *Regina v. Langhorn*, 4 A. & E. 538; *Cannon v. Toronto Corn Exchange*, 27 Gr. 35; *Dean v. Bennett*, L. R. 9 Eq. 625.

The evidence should have been given under oath before the committee. Sec. 36 of R. S. O. ch. 145 gives authority to take evidence under oath; and express statutory power being thus given, the expression "due inquiry" in sec. 44 must mean "inquiry according to the provisions of the statute," i. e., under oath. This was a judicial investigation, and the evidence should have been given under oath *Taylor on Evidence*, sec. 1878; *Re Rushbrook and Starr*, 46 U. C. R. 73. The objection to the irregularity is open to us; we did not waive it by acquiescence: *Serjeant v. Dale*, 2 Q. B. D. 558.

The report of the committee was based on statements and evidence, not on the admissions of the plaintiff, and, therefore, if he made admissions, there is nothing to shew that they were acted upon. The evidence is not embodied in the report, and was not even read to the general body of Benchers in its entirety. The committee found certain facts; but the statute does not permit the delegation to a committee of the power to find; it was for the Benchers to find the facts upon the evidence reported to them. But how could they come to a conclusion on the evidence

without having heard or read the whole of it? The Argument. motion was not put before Convocation properly. The question presented was whether or not the report of the committee should be supported and affirmed, making it an issue between the committee and the general body of Benchers, while the question which should have been submitted was whether the plaintiff was guilty of unprofessional conduct.

The plaintiff was improperly called upon to shew cause why the report should not be adopted; he should have been called upon before any findings were made.

It is part of the unwritten law that if a solicitor makes restitution he is to be relieved from the consequences of his wrong-doing. It is customary to see motions to the Court to have solicitors struck off the rolls enlarged from time to time to give the solicitors a chance to make restitution; and if they do so, the motions are dropped. Why should this plaintiff be struck off so summarily for a comparatively trifling offence, after he had made restitution, when so many others go free? He was not treated with common fairness by the Benchers; he was refused a very reasonable request for a short enlargement to retain counsel; he was urged to make restitution, and did so, and then was disbarred. The Court will take a lenient view where restitution is made: *Re Attorney*, 34 U. C. R. 246; *Re Stewart*, L. R. 2 P. C. 88.

In inflicting the extreme penalty of striking the solicitor off the rolls and disbarring him, the Law Society were unnecessarily harsh and severe.

Reeve, Q. C., and *Walter Read*, for the defendants. Upon the question of the character in which the plaintiff acted, see *Osgood v. Nelson*, 10 B. & S. 119; L. R. 5 H. L. 536. As to regularity of proceedings of committee, *Richardson-Gardner v. Fremantle*, 24 L. T. N. S. 81. As to examination upon oath, *Smith v. Goff*, 3 D. & L. 47; *Biggs v. Hansell*, 16 C. B. 562; *Sells v. Hoare*, 3 Brod. & Bing. 232; *Birch v. Somerville*, 2 Ir. C. L. 243; *Taylor on Evidence*, 7th ed., sec. 1380; *Allen v. Francis*, 4 D. & L. 607; *Rickards*

Argument. *v. Hough*, 30 W. R. 676. As to the construction of the section of the statute giving power to examine on oath, *The King v. Eye*, 1 B. & C. 85. The following cases lay down the principles governing Courts upon review of proceedings of this nature: *Dawkins v. Antrobus*, 17 Ch. D. 615; *Hopkinson v. Marquis of Exeter*, L. R. 5 Eq. 63; *Labouchere v. Wharnccliffe*, 13 Ch. D. 346; *Manisty v. Kenealy*, 24 W. R. 918; *Rex v. Gray's Inn*, 1 Dougl. 353; *Rex v. Lincoln's Inn*, 4 B. & C. 855.

The right to administer an oath in proceedings before the committee is merely a superadded power, and the statute conferring it does not create an obligation, but permits proceedings under oath if the committee consider it advisable.

February 4, 1889. STREET, J. :—

On 21st May, 1888, Miss Jemmetta Craine presented a petition to the Benchers of the Law Society of Ontario setting forth that she had entrusted to the plaintiff, a practising barrister and solicitor, a power of attorney authorizing him to sell fifteen shares of stock in the Traders Bank on her account; that he had sold five shares and received the purchase money, and refused to pay over the same to her; that he had caused the remaining ten shares to be transferred into his own name; and that he refused to account to her for these shares or to transfer them back to her. The petition charged that the plaintiff's conduct was improper and unprofessional, and prayed that the charge might be inquired into and adjudicated upon.

The powers of the Benchers to deal with such a charge are derived from sec. 44 of ch. 145, R. S. O., which is to the effect that whenever a barrister or solicitor may be found by the Benchers, after due inquiry by a committee of their number or otherwise, guilty of professional misconduct, or of conduct unbecoming a barrister or solicitor, it shall be lawful for the said Benchers in Convocation to

disbar any such barrister, and to resolve that any such solicitor is unworthy to practise as such solicitor.

Judgment.
STREET, J.

By secs. 40 and 43 of the same Act the Benchers are authorized to make rules from time to time respecting, *inter alia*, matters relating to the discipline, honour, and practice of barristers and solicitors.

By the Law Society rule 25 of sec. 13 of their rules, the Benchers have enacted that whenever any complaint shall be made to the Society charging any barrister or solicitor with misconduct, such complaint shall be reduced to writing and submitted to Convocation, and in case Convocation shall be of opinion that a *prima facie* case has been shewn, the matter shall be sent to the Discipline Committee for investigation, and the committee shall thereupon send a copy of the complaint to the party complained of, and shall notify in writing the complainant and party against whom the complaint has been made of the time and place appointed for such investigation, and the committee shall at the time and place appointed proceed with the investigation, and shall reduce to writing the statements made and evidence adduced by the parties or such of them as shall appear pursuant to such notice, and shall submit the same together with all books and papers relating to the matter with their views thereon to Convocation, who shall take such action thereon as to Convocation shall seem just and meet; provided that no barrister shall be disbarred nor attorney deprived of his certificate without a two-thirds majority of Benchers then present in Convocation, which shall consist of not less than fifteen members; provided always that it shall be competent for Convocation to refer the matter to the Discipline Committee to consider and report whether a *prima facie* case has been shewn.

On the day upon which the petition of Miss Craine was presented to Convocation the minutes of the proceedings shew that the complaint was read and referred to the Committee on Discipline. On 1st June, 1888, Mr. MacKelcan, from the Discipline Committee, reported that a *prima facie* case had been made out, and recommended an investigation.

Judgment. Whereupon it was ordered that the report be adopted
STREET, J. and that the complaint be referred to the Discipline Committee for investigation and report.

By rule 1 of sec. 13 of the Law Society rules, a standing Committee on Discipline is elected annually, on the first Saturday in Easter term, consisting of nine members in addition to the treasurer, who is *ex officio* a member; and it is declared that three members of the committee shall form a quorum.

The treasurer of the Law Society was absent from Canada during the months of May, June, July, and August.

No evidence was given as to the manner in which the meeting of the Committee on Discipline was called at which the report was adopted that a *prima facie* case had been made out against the plaintiff; it is in evidence, however, that when the matter had been referred by Convocation on 1st June to the Discipline Committee for investigation and report, a postal card was sent by the secretary of the Law Society to each member of the Discipline Committee other than the treasurer, who was absent, calling the committee together for the 16th of June at 11 a. m.; but the purpose for which the committee was called together was not in any way mentioned or referred to in the notice then given. This day had been fixed for holding the investigation at a meeting of the Discipline Committee held on 9th June, four members being present, at which it was directed that a copy of the complaint should be sent to the plaintiff and that he should be notified in writing of the time and place of investigation, viz., Convocation room at the Hall on Saturday, 16th June, at 11 a. m., and that the counsel for the applicant should also be notified. These directions of the committee appear to have been complied with, and the plaintiff was notified of the object of the meeting.

On 16th June the plaintiff appeared with his witnesses but without counsel, and the petitioner, Miss Craine, appeared with her counsel and witnesses. An application by the plaintiff for an adjournment of the investigation was refused, no sufficient ground being adduced in support

of it. Three members only of the Discipline Committee were present. The evidence of the parties and their witnesses was taken, but not under oath, no objection being taken to this procedure. The matter was then argued, and the committee adjourned to 23rd June at 11 a. m.

Judgment.
STREET, J.

On 23rd June the committee met; Mr. Hands was present, and handed in a letter, and asked for delay; the committee, however, proceeded to draw up a report that he had been guilty of professional misconduct, and that he should be disbarred, and his name struck off the rolls. This report was signed by the chairman of the committee and was presented to Convocation on 26th June, and it was thereupon ordered that it be considered on the 4th September then next, and that a call of the Bench should be made for that day.

On the 4th September, twenty-two Benchers being present, the consideration of the report was moved; it was then ordered that the plaintiff should be called upon to shew cause why the report should not be acted on by Convocation. Mr. Hands and his counsel being in attendance were thereupon admitted to Convocation, and counsel addressed the Benchers present, discussing the evidence and urging that no action should be taken, as restitution had been made to Miss Craine since the proceedings had been taken.

Before the plaintiff and his counsel were admitted a large portion but not the whole of the evidence taken before the committee was read to the Benchers present. After their withdrawal the following resolution was passed unanimously: "On hearing the report of the Discipline Committee, and having considered the evidence adduced, and Mr. Hands having been duly called upon to shew cause why the report of said committee should not be acted upon by Convocation, and Mr. Hands having thereupon attended before Convocation, upon hearing what was alleged by Mr. Hands by himself and through his counsel, and it having been found after due inquiry that John Baldwin

Judgment.

STREET, J.

Hands has been guilty of conduct unbecoming a barrister or solicitor: It is resolved that the report of the said committee be adopted, and it is further resolved that John Baldwin Hands is unworthy to practise as a solicitor, and that he be disbarred as a barrister."

This action was brought by the plaintiff on 21st September, 1888, setting out the proceedings, alleging that they were illegal, defective, and improper, and praying to have the resolution of Convocation of 4th September declared void, and that the defendants might be restrained from taking further proceedings under it. After statement of defence had been filed and issue joined the action was tried before His Lordship the Chancellor, who ordered that the action should be dismissed with costs. The plaintiff moved at the sittings of the Divisional Court in November against this judgment, and the motion was argued on the 5th December, 1888.

Many grounds are set out in the notice of motion, but it appears to me unnecessary that they should all be considered.

The plaintiff urges that the resolution of the Benchers ordering that he be disbarred is founded upon evidence which was not taken under oath.

Sec. 36 of ch. 145, R. S. O., provides that "On the hearing of any election petition or upon any inquiry by a committee the Benchers or committee *shall have power* to examine witnesses under oath."

The defendants insist that these words confer a discretion upon them to be exercised in each case, to proceed upon sworn or unsworn testimony as they may think proper.

The meaning of the words, "it shall be lawful," occurring in a statute, is very thoroughly discussed in *The Queen v. The Bishop of Oxford*, 4 Q. B. D. 245, *ib.* 525, and 5 App. Cas. 214. Lord Bramwell at 4 Q. B. D. 553, with some hesitation proposes this rule: "A statute giving a power means that it should be exercised in certain cases; where the conditions of those cases are always the same,

then it must mean the power should be exercised in all those cases, and so is compulsory. * * * An example of this is seen in *MacDougall v. Paterson*, 11 C. B. 755, where the power to give costs was made dependent on the plaintiff living twenty miles from the defendant. That was the sole condition, and of course would exist without variation in every case where it existed at all. But where the circumstances of the case vary, then words empowering, but not commanding, are not obligatory."

At p. 222, 5 App. Cas., in the same case Lord Cairns says : " The words, ' it shall be lawful,' are not equivocal. They are plain and unambiguous. They are words merely making that legal and possible which there would otherwise be no right or authority to do. They confer a faculty or power, and they do not of themselves do more than confer a faculty or power. But there may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom the power is reposed, to exercise that power when called upon to do so." The question presented in the judgment of Lord Penzance, in the same case at, at p. 232, is, " whether in the present case there are any considerations sufficiently cogent to exclude the idea that the Legislature intended a discretion." Lord Selborne, at p. 235, says that the words " ' it shall be lawful ' are potential, and never (in themselves) significant of any obligation. The question whether a Judge, or a public officer, to whom a power is given by such words, is bound to use it upon any particular occasion, or in any particular manner, must be solved *aliunde*, and, in general, it is to be solved from the context, from the particular provisions, or from the general scope and objects, of the enactment conferring the power." See also *Aitchison v. Mann*, 9 P. R. 473; *Bell v. Crane*, L. R. 8 Q. B. 481; *Re Neath and Brecon R. W. Co.*, L. R. 9 Ch. 263; *Taylor v. Taylor*, 1 Ch. D. 426.

Judgment.
STREET, J.

Judgment.

STREET, J.

By the statute from which the Benchers of the Law Society obtain their power to examine witnesses upon oath, they are authorized to inquire by a committee of their number or otherwise into any charge of professional misconduct on the part of any barrister, solicitor, student-at-law, or articled clerk, and, in case such charge is made out, to disbar such barrister, to resolve that such solicitor is unworthy to practise, and to expel such student or articled clerk from the Society, or to withhold from him the right to be admitted to examination; then by the 36th section above quoted, upon any such inquiry the Benchers or committee shall have power to examine witnesses upon oath. The powers committed to the defendants by these provisions involve, first the right to judge, and next the right to inflict punishment; the offences over which they have jurisdiction may be, as the present case shews, of a flagrant character, and are always of a serious one, and the punishment involves the professional ruin of the person found guilty of them. The persons to whom these powers are given are a body of experienced lawyers, trained in the practice of Courts from which unsworn evidence is jealously excluded, or to which it is admitted only from the necessity arising in certain well defined exceptions to the rigid rule which excludes it.

The only power expressly given by the statute to the defendants to examine witnesses at all is coupled with the power to examine them upon oath. It is to be borne in mind that if a discretion exists at all, it might be exercised in opposition to the most urgent request of a barrister charged with professional misconduct that he should not be condemned on unsworn testimony. It is impossible to conceive such an exercise of the discretion, if it exists, but this very fact goes to rebut the idea that it can have been intended to be conferred. Taking, therefore, the nature of the thing here empowered to be done, the object for which it is to be done, and the conditions under which it is to be done, there are found considerations sufficiently cogent to exclude the idea that the Legislature intended to

confer upon the defendants a discretion to examine witnesses without the protection of an oath in an inquiry such as that in the present case.

Judgment.
STREET, J.

I have examined the statements of the plaintiff made to the committee for the purpose of ascertaining whether his admissions alone are such as to have justified the committee in the conclusion at which they arrived. He appears to have admitted the main and substantial circumstances connected with the charge against him, but he has coupled his admissions with other qualifying statements, and I am unable to say what decision might have been come to if no other statements than his own had been before the committee and the Benchers.

It is pressed by the defendants that the objection that the witnesses were not sworn is not open to the plaintiff, because he acquiesced in the evidence being so taken by not objecting and by giving his own evidence in the same manner. There is nothing to shew here any express intention on the part of the plaintiff to waive any rights which he had; on the contrary, it does not appear to have been thought either by him or by the members of the committee that there was any right on the part of the committee to examine witnesses upon oath, that power having been only lately conferred upon the defendants, in inquiries such as the present, and not having been brought to the notice of the members of the committee who were present at the inquiry. The right to enter upon such an inquiry and to disbar a barrister who is found unworthy to practise, has doubtless been conferred upon the defendants in the public interest; the question to be determined here was one affecting the public at large and was not a mere private matter between plaintiff and defendants, and if I am right in thinking that the Legislature intended that evidence upon such inquiries was always to be taken upon oath, and not to confer upon the defendants a discretion to take it upon oath or without oath as they should think proper in each case as it arose, then I think it follows that they could not by arrangement between

Judgment. themselves and the plaintiff adopt a different mode of
STREET, J. obtaining the facts than that which the Legislature has prescribed in conferring their authority upon them. The proceeding against the plaintiff was *in invitum* and, at all events in the absence of an express consent on his part, it lies upon the defendants to shew that they proceeded in the inquiry which led to their sentence in strict accordance with their powers, and this, in my view of their powers, they failed to do when they examined unsworn witnesses.

I think this case is to be distinguished from *Osgood v. Nelson*, L. R. 5 H. L. 636; that was an inquiry by a corporation into the conduct of one of its own officers, holding a freehold office, it is true, but still an officer liable to be dismissed for misconduct, and holding office under the corporation merely during good behaviour; the power of the defendants in the present case is a power to punish its members for misconduct.

The other point raised by the plaintiff in regard to which I think the inquiry was not conducted with strict regularity, is that with regard to the constitution of the committee which actually conducted the inquiry.

The Benchers, after hearing the report of the Discipline Committee that a *prima facie* case had been made out by the petitioner, referred the complaint to that committee for investigation and report.

Their powers under the Act are to disbar "after due inquiry by a committee of their number or otherwise." In referring the inquiry to a committee, the Benchers, no doubt, adopted the only feasible manner of making it properly. The reference was to a committee composed of the ten persons who constituted the Discipline Committee, including the treasurer; and, as it was one of the rules governing that committee that three members of it should form a quorum, it may be that we should be able to treat that rule as being properly incorporated into the reference in this matter as a part of the constitution of the body to which the inquiry was referred. It is obvious, however,

that something more is required to constitute a quorum than the mere meeting of the number of members necessary to constitute one; otherwise there might here be three separate sittings of the committee going on contemporaneously, each in a separate room, and each with a full quorum; and it must follow that nine members of the committee could not meet together and act as the committee unless the tenth member had been duly notified. The treasurer was a member of the committee named by Convocation; the other members were bound to treat him as a member, and could not, because he happened to be absent, treat him as if he had not been named as a member.

Judgment.

STREET, J.

The report of the members of the committee who did meet, and the proceedings of Convocation founded upon it, are, therefore, in my opinion, irregular, and must be set aside.

See 1 *Bulstr.* 105; *Rex v. Langhorn*, 4 A. & E. 538; *People v. Batchelor*, 22 N.Y. 134; *Morawetz on Corporations*, 2nd ed., para. 479 and note: *Grindley v. Barker*, 1 B. & P. 229; *Rex v. Whitaker*, 9 B. & C. 648; *Doe dem. Nicholson v. Middleton*, 3 Brod. & Bing. 214; *Astor v. Mayor, etc., of New York*, 62 N. Y. at p. 576.

If the reference by Convocation is to be taken as a reference to the nine members who were in the Province at the time, then without special authority to them constituting a certain number of them a quorum, the powers conferred upon the whole nine could not properly be exercised by three. Such special authority was not conferred, because the rule which says that three members of a discipline committee of ten shall constitute a quorum is not applicable to a special committee called the Discipline Committee, which consists of only nine members.

I am of opinion also that the members of the committee should not only have been notified that a meeting of the committee was to take place but that the notice should have informed them of the special purpose for which it was called. The notice sent to the nine members merely informed them that a meeting of the Discipline Committee would be held at a certain time and place.

Judgment.

STREET, J.

It is true that the rules of the defendants are silent with regard to the manner in which meetings of committees are to be called and as to the nature of the notice given, but this was not held to do away with the necessity for calling the attention of the member to the nature of the business which he was summoned to transact in *Rex v. Faversham*, 8 T. R. 356, or in *Cannon v. Corn Exchange*, 27 Gr. 23. See also *Marsh v. Huron College*, 27 Gr. 605; see also Taylor on Private Corporations, sec. 574; Bacon on Benefit Societies, sec. 67.

Had all the members of the committee attended, this objection would have fallen to the ground; as it was, however, only three out of the nine members forming it were present. The form of the notice and its deficiency were not known to the plaintiff, and he cannot be taken to have waived any right to object on this ground. See *Labouchere v. Wharnccliffe*, 13 Ch. D. 346.

I think there is nothing in the objection that the whole of the evidence was not read to the Benchers when the report of the Discipline Committee was considered and discussed. See *Osgood v. Nelson*, L. R. 5 H. L. 636.

I think the judgment of the Chancellor should upon these ground be reversed, and that the defendants should be restrained from proceeding upon the report of the committee and the resolution which they have passed with regard to the plaintiff.

The plaintiff in the action brings it in person, and I think the facts stated by himself are such that we should make no order as to the costs either of the action or the motion.

FALCONBRIDGE, J. :—

The question whether a case like the present should be put on the same plane with a criminal prosecution is discussed and expressly negatived in *Osgood v. Nelson*, L. R. 5 H. L. 636: it is an official inquiry—an inquiry fraught, it is true, with the gravest consequences to the

plaintiff, but still "not to be assimilated to a criminal prosecution:" per Lord Colonsay, p. 652.

Judgment.
Falconbridge,
J.

Of course we should "take care that any proceeding of this kind should be conducted in a proper manner; that the person it was proposed to remove should have every opportunity of cross-examining the witnesses brought forward against him, or of otherwise opposing the case set up against him; that he should have the power of calling witnesses to prove his own case; and that he should have every possible opportunity which a person can have according to the law and constitution of this country, of defending himself and of establishing that he is not liable to motion:" per Mr. Baron Martin, at p. 646.

All these undoubted rights and privileges the plaintiff, in my opinion, had, and if the plaintiff should succeed in reversing the judgment of the Benchers, he will do so only by virtue of the merest technicality.

The investigation by the Committee on Discipline was not, in my view, a case of delegation of authority, lawful or unlawful, but a due exercise of authority by the Benchers in pursuance of their rules.

The power to examine witnesses under oath which appears for the first time in the statute book in R. S. O. ch. 145, sec. 36, and which is said to have been conferred by the revisers, seems to have been unknown to the Benchers at the time of these proceedings. The plaintiff can no more plead ignorance of the law than can the Law Society, and he cannot now claim the benefit of an objection which he did not insist on at the time.

The statute is not in form imperative, and no authority was cited for the proposition that "shall have power to" is equivalent to "shall."

I do not regard the proceedings before the committee as the trial of the case. The evidence was there taken and presented afterwards to Convocation.

Before Convocation, the evidence and report of the committee were presented. The plaintiff and his counsel attended, and had then a further opportunity of objecting

Judgment. to any of the numerous alleged irregularities in the pre-
Falconbridge, vious proceedings, or in those which were then in progress,
J. which the learned counsel for the plaintiff has so ably and ingeniously raised before us. He did not do so, but his counsel, making no request for further time to consider the matter, pointed out matters of evidence and circumstances which he thought invited the clemency of the tribunal.

The plaintiff, and his counsel acting on the plaintiff's instructions, submitted themselves fully to the jurisdiction of that forum—"taking their chances with the jury," to adopt the expression of the Chancellor—relying on the sole ground that, as restitution had been made, judgment should be arrested or the penalty mitigated. See plaintiff's evidence, p. 32: "I told him, Mr. F., what had taken place, and wished him to go up and say a few words to the Benchers, and I thought the matter would be all right."

The fact that restitution had been made was fully before Convocation, and it was entirely for that body to say how far it affected the nature and extent of the punishment to be inflicted.

There is a prevailing impression amongst the laity that there is no arm either of the Court or of the Law Society strong enough to save the honour of the profession of the law, or long enough to reach an unworthy practitioner of it, and I do not feel called on to be astute to find reasons for setting aside the judgment of the Benchers of the Law Society of Upper Canada, honestly and fairly exercised in the discharge of a gratuitous and thankless duty.

I agree with the learned Chancellor in thinking that there was enough in plaintiff's statements and admissions to justify the action of the defendants.

The appeal should be dismissed with costs.

ARMOUR, C. J., agreed with STREET, J.

Judgment for plaintiff.

[QUEEN'S BENCH DIVISION.]

WELLS V. SUPREME COURT OF THE INDEPENDENT ORDER
OF FORESTERS.

Insurance—Life—Benevolent society—Standing of deceased member—Reinstatement—Estoppel—Waiver—Costs.

W., who was a member of a subordinate court of the defendant society, died on the 6th May, 1884. His administratrix claimed in this action the amount of an endowment certificate upon his life, which was subject to a condition that the assured should at the time of his death be a member of the society in good standing. W. had not paid his monthly assessment due 1st March, 1884, and by his failure to pay had become at once suspended by virtue of one of the by-laws of the society, and his name appeared upon the list of suspended members in the minutes of a meeting held that month. He had taken cold at Christmas, 1883, and by the end of February, 1884, it was apparent that he could not recover, and he never rallied up to the time of his death. Shortly before the 25th April, 1884, a sum sufficient to pay his assessments due 1st March, 1st April, and 1st May was paid on his behalf to the financial secretary of the subordinate court. The conditions to be performed by a suspended member desirous of being reinstated after a suspension had been force for thirty days were, according to the by-laws, payment of arrears, passing medical examination, and being approved of by two-thirds vote of the subordinate court. It was not possible for W. to have complied with the second condition, and he did not attempt to do so.

Held, that the by-laws were binding upon W. and the plaintiff, and that he, not having been reinstated in accordance therewith, was not a member in good standing at the time of his death.

It was contended, however, that the fact of the receipt of the arrears by the financial secretary, and certain other circumstances, shewed a waiver or created an estoppel on the part of the defendants.

It appeared that the financial secretary was not familiar with the by-laws, and thought and informed W. that he was restored to good standing by the payment of arrears; that he transmitted the assessments paid to the supreme secretary of the society, who received and retained them, but carried them to the credit of the subordinate court, instead of to the credit of W., because in his view the reinstatement was not completed; and that W. was reported reinstated by the subordinate court on 25th April, 1884. The financial secretary had the right, under the by-laws, to receive the arrears, but only as a first step towards reinstatement.

Held, that in view of the fact that W. was hopelessly ill when the supreme secretary acknowledged the receipt of the assessments, there was no ground for the contention that the defendants were estopped from denying that they accepted the money with the intention of keeping the policy alive and of waiving the medical examination; and that, under all the circumstances, there was neither the intention nor the authority on the part of the supreme secretary to waive the examination.

As the plaintiff had been led by the action of the supreme secretary and the officers of the court below to believe that W. had been reinstated, no costs were given against her.

Statement.

THE plaintiff in this action was a daughter of one Jeremiah Wells, and the administratrix of his estate, and claimed to recover from the defendants \$1,000, the amount of a policy of insurance or endowment certificate upon the life of her father. The defendants were a society incorporated under the "Act respecting Benevolent, Provident, and other Societies." The policy of insurance was subject to a condition that the assured should at the time of his death be a member in good standing in the Independent Order of Foresters, according to the laws, rules, and regulations of the supreme court of the order. The defendants alleged in their statement of defence that Jeremiah Wells, the assured, was not at the time of his death a member in good standing in the order according to the rules and regulations, and alleged that he had become suspended from all rights under the policy of insurance and otherwise, according to the rules of the order, by reason of non-payment of dues and assessments required by the rules to be paid by him. The plaintiff joined issue upon the statement of defence, and replied: (2) That if Jeremiah Wells ever was suspended for non-payment of dues and assessments, which she did not admit, such alleged suspension was illegal and void because such dues were not lawfully demanded either from him or from the plaintiff, to whom an interest in such policy had been assigned, as the defendants knew. (3) That after the time at which such suspension was alleged to have taken place, the defendants claimed from Jeremiah Wells and received and accepted from him the full amount of such dues and assessments, and also the dues and assessments thereafter accruing from time to time until his death, with full knowledge of such default and suspension, if any existed, and received the benefit of such dues and assessments in the same manner in all respects as if he had continued to be a member in good standing in the order, as in fact he did continue to be, and treated and acknowledged him as being a member in good standing, and thereby waived such alleged default and suspension, and were estop-

ped from denying that he was at the time of his death a ^{Statement.} member in good standing in the said order.

The action was tried at St. Thomas on the 2nd October, 1888, before Falconbridge, J., without a jury, and a verdict was entered by him for the plaintiff for \$1,000.

Against this verdict *J. A. McGillivray*, for the defendants, moved during the November Sittings, 1888, of the Divisional Court, upon the ground that Dr. Wells, the father of the plaintiff, and the person assured under the policy was not at the time of his death a member in good standing of the defendant order.

Tremear, for the plaintiff, opposed the motion.

The evidence is stated in the judgment of Street, J.

February 4, 1889. STREET, J.:—

The constitution and by-laws of the Independent Order of Foresters were put in at the trial. From them it appears that the defendants are incorporated under the Act above referred to by the name under which this action is brought against them. The corporate officers are elected annually at a meeting composed of representatives from the various branches of the order, called "subordinate courts," these branches being organized under the authority of the officers of the supreme court or central body. All policies of insurance are issued by the supreme court. The members of the order are persons who have joined some one of the subordinate courts. Each member upon joining the order is obliged to take out a policy of insurance upon his life for at least \$1,000, and is not allowed to take one for more than \$3,000. A scale of monthly assessments payable by each member is contained in the by-laws; these assessments are payable by each member on or before the first day of each month to the financial secretary of the subordinate court to which he belongs, and he remits monthly to

Judgment. the secretary of the supreme court (called the supreme
STREET, J. secretary), the amount of the assessments received by him, and these assessments form the fund from which the claims under the policies of insurance are paid.

The term "good standing," in the order is defined by by-law 52 as signifying "that the member is not either suspended or expelled from his court, or from the order, and that he has paid within the prescribed time * * * all his assessments for the endowment fund." By the same by-law it is declared, that "a member not in good standing loses all his rights and claims upon the order, of whatsoever kind and nature, and can only regain them when reinstated according to these laws."

By-law 247 provides that in case "a member has not to his credit in the court treasury the full amount of one assessment for each \$1,000 of endowment held by him on the first day of each and every month, *he shall stand suspended*, and he shall not be entitled thereafter to receive any benefit from the court or order until he is duly and legally reinstated."

By-law 117 provides the mode in which a member suspended for non-payment of assessments may within thirty days from his having become suspended be reinstated.

By-law 118 provides that any member suspended for non-payment of any accrued liability, and not having been reinstated within thirty days from the date of suspension, as provided in section 117, can be reinstated only on payment of all arrearages, passing again the medical examination of the order, and being approved by a two-thirds vote of his court.

By-law 119 provides that "on the reinstatement of any member the financial secretary shall at once transmit due notice on form No. 8 to the supreme secretary giving name in full, date of admission, date of suspension, and date of reinstatement, and *no one shall be deemed to be reinstated till after the transmission of such notice.*"

By-law 120 provides that "no member of the order can, under any circumstances, be reinstated, without he is at

the time of reinstatement in good bodily and mental health; and any court knowingly reinstating a member while ill or disabled, or in any way unsound in mind or body, shall *ipso facto* forfeit its charter * * and such reinstatement shall be irregular and void and of no effect, and if the member sought to be reinstated has been a consenting party to such irregularity, he shall be expelled from the order by the executive council." Judgment.
STREET, J.

By by-laws 248 and 249 the secretary of each court is required to make a return to the supreme secretary at the beginning of each month of the names and ages of the persons admitted to membership or reinstated since last report; the names and ages of those who have died, been suspended, or expelled, or who have withdrawn from the order since last report; and is on the first day of each month to remit to the supreme secretary the amount of one assessment for the endowment fund for each member of the court in good standing, and the amount of all arrearages due on each reinstated member.

The "medical examination of the order" mentioned in by-law 118, is defined by by-law 53 as follows: "The medical examination of the order consists of three parts, viz:

"(1) The full, explicit, and correct answers to all the questions propounded to applicants in the medical examination forms.

"(2) The examination which is to be made upon the prescribed form by a duly commissioned court physician, or by a physician specially authorized by the supreme chief ranger to make the medical examination; and

"(3) The review of such medical examination by the medical board."

The medical board is to be elected annually at the annual meeting of the delegates from the subordinate courts, and other persons are *ex officio* members of it.

We have here an elaborate system of rules, carefully planned in the interest of the company, and having for their main object the enforcement of absolute punctuality in the

Judgment.

STREET, J.

payment of the monthly sums which go to form the fund to meet claims, under penalty of immediate suspension from any rights on the part of the assured ; and these rules are so framed that a member once suspended can only be restored to his former rights by the consent and with the approval of the central governing body of the order. With the extremely small monthly payments called for by the rules, and the large number of persons insured from time to time under such a system as this, it does not seem unreasonable that the system should be a stringent one, in order to prevent endless trouble in the collecting of assessments and endless confusion in regard to claims of this nature.

The facts of the case, so far as they concern this particular policy, (for other claims were sued for as to which no contest here arises) do not seem to be of a complicated nature nor open to much dispute.

On the 19th January, 1883, the defendants authorized the formation of a subordinate court at Aylmer, Ontario, called "Court Elgin No. 29," of which Jeremiah Wells became at once a member. On the 1st of February, 1883, he paid his first monthly assessment of 92 cents and became entitled to a policy for \$1,000, which was issued to him on the 10th of February, 1883. On the 23rd November 1883, in accordance with the rules of the order, he directed that the benefits to arise under the policy should be paid to his daughter Minnie Wells, the plaintiff in this action. He continued to pay his monthly assessments regularly until and inclusive of 1st February, 1884 ; he failed to pay the assessment due 1st March, 1884, and by such failure he became at once suspended by virtue of by-law 247, and ceased to be a member of the order "in good standing," under by-law 52, and his name appears in the minutes of the meeting of "Court Elgin No. 29" held on 14th March, 1884, in the list of suspended members. He had taken a severe cold at Christmas, 1883, which had settled upon his lungs, and by the end of February it was apparent that he could not recover ; he never rallied from this illness, and died on 6th May, 1884. A day or two before the 25th April a sum

sufficient to pay the assessments for 1st March, 1st April, and 1st May was paid to the financial secretary of Court Elgin No. 29, either by Mr. Collington, the son-in-law of Wells, or by some other friend of his. On the 25th April the sum of \$1.84, being the arrears due 1st March and 1st April, was sent by Dr. McCausland, the financial secretary of the subordinate court, without any return or explanatory statement, to Mr. Cummer, the supreme secretary of the order, and were acknowledged by the latter by post card as "endowment assessment for April, for J. Wells," the post card being dated on 29th April. On 25th April the regular meeting of the subordinate court was held, and the name of Wells was reported as that of a member who had been reinstated, and amongst the payments reported to the meeting appears, "J. Wells \$1.84." No other meeting of the Court was held until after the death of Dr. Wells, but in the monthly report sent down by Dr. McCausland, the financial secretary, to the supreme secretary after the death of Dr. Wells, and before the 14th of May, his name appears on the list of "members in good standing," as having paid 92 cents, which with other moneys is enclosed with the report. A list of "members reinstated since last report" forms part of the return, and the name of Dr. Wells does not appear in that list, although, if reinstated at all, he had been reinstated during the period covered by the report.

The supreme secretary acknowledged receipt of this return and of the money enclosed in it on 16th May, adding at the foot of his post card "Reinstatement assessments held subject to the re-examination, as required by the constitution."

The supreme secretary, being called and having produced his register of payments of assessments made up from the monthly returns sent in to him, swore that the reason why he did not give credit to Dr. Wells' account in the register for the \$1.84 and the 92 cents remitted on the 29th April and the beginning of May, as he would have done in the ordinary course, but credited them to the

Judgment.
STREET, J.

Judgment. account of the subordinate court, was because of the fact
STREET, J. that the completion of the reinstatement had not taken place.

Dr. McCausland in his evidence states that Wells "was reported reinstated on April the 25th, along with two other members, the sum of \$1.84 having been paid over on or about 25th April to pay the assessments due by the deceased for the months of March and April, 1884. I don't remember who paid it, but it was paid on his behalf, and I reported the matter to the local court, and the money was promptly sent to the supreme secretary at Hamilton, within a few days, and deceased died within ten days of that time. I reported his illness as extending over a period of sixty days prior to his death. The nature of the illness was inflammation of the lungs. The deceased was in a very serious condition at the time of the payment of the \$1.84, and at the time of his death *I was under the impression that any suspended member could be reinstated within ninety days by payment of back dues, without medical re-examination*: that was the reason that I reported the deceased as re-instated on 25th April."

The deceased was buried by the members of Court Elgin No. 29, as a person who had died whilst a member and at the expense of the court. After his death, on 14th May, 1884, the supreme secretary wrote to the financial secretary of the court that "if it turns out on investigation, as it now appears, that the late brother was sought to be improperly reinstated, the assessments remitted will be refunded to your court." It appears that about the 25th of April the deceased was informed by Dr. McCausland, the financial secretary of the court, that he had been actually reinstated in the order, by what had been done.

The by-laws of the order, whether actually shewn to have come to the knowledge of the deceased or not, are binding upon him, because it was his duty to make himself acquainted with the terms of the policy delivered to him, in which these by-laws are incorporated as a special

condition. It is clear beyond question that his reinstatement was not only not in accordance with the by-laws, but was in direct violation of them, and that if the rights of the plaintiff are to be governed by the by-laws, she cannot succeed in this action, because according to the by-laws the deceased was not a member in good standing in the order at the time of his death. The financial secretary of the subordinate court was the agent of the company to receive the monthly assessments from persons in good standing and also from persons who had been suspended for non-payment of their assessments and were in course of reinstatement. The conditions to be performed by a suspended member desirous of being reinstated, after a suspension had been in force for over thirty days, were: 1st, payment of arrearages; 2nd, passing medical examination; 3rd, being approved by two-thirds vote of his court. Of these three conditions to his reinstatement the deceased had performed only the first, and possibly the third, as the fact of his reinstatement was mentioned and not objected to at the court meeting on 25th April. It is conceded on all hands that his state of health was such that it was impossible for him to have complied with the second of these conditions, and he did not attempt to do so. The facts of the receipt of his arrears by the financial secretary of the court, and of his having assured the deceased that his standing in the court had been restored, and that the supreme secretary had received and retained the two sums of \$1.84 and 92 cents, are relied upon by the plaintiff as showing a waiver or creating an estoppel on the part of the defendants. It is certainly true that in many cases this has been so held: *Wing v. Harvey*, 5 D. M. & G. 265; *Hodsdon v. Guardian Life Insurance Co.*, 97 Mass. 144; *Frost v. Saratoga Mutual*, 5 Denio 154; *Watts v. Atlantic Mutual*, 31 C. P. 53; *Neill v. Union Mutual*, 7 A. R. 171; *Moffatt v. Reliance*, 45 U. C. R. 561; *Accey v. Fernie*, 7 M. & W. 151; *Busteed v. West of England Ins. Co.*, 5 Ir. Chy. Rep. at 571; but the application to societies of this nature

Judgment.

STREET, J.

Judgment. of the doctrine of waiver has been questioned in an
STREET, J. American case of *Borgraefe v. Knights of Honor*, 22 Missouri Appeal Reports 127, where many of the questions arising here are very fully discussed.

In every case, however, in which the fact of payment and receipt have been held to operate as a waiver of a forfeiture, the receipt of the premium has been inconsistent with an intention of the company to insist upon the forfeiture. Waiver depends upon the intention existing in the person receiving the payment, as implied from the circumstances under which it has been received. If a payment is received under circumstances which are as consistent with an intention not to waive any right as with a contrary intention, and nothing is done on the part of the insurer to shew an intention one way or the other, it would be unjust to presume against him that he received the payment intending to waive his rights. The onus is upon the party alleging a waiver to prove facts which establish it.

The financial secretary of the court here accepted these payments not intending to waive any rights which the defendants had, for he was ignorant that any such rights existed; he supposed the mere payment within ninety days of the suspension operated as a reinstatement. But both he and the assured were bound to know from the by-laws that the payment of the arrears was only the first step towards the restoration of the assured to his rights. The financial secretary was an agent to receive the assessments under certain conditions, which were binding upon both himself and the deceased. He had full right to receive the arrears from the assured, but only as a first step towards the reinstatement of the latter. He was required by the by-laws to pay all moneys over to the treasurer (by-law 197) of the court, from whom on the first of each month he is to obtain a cheque for the moneys payable to the supreme secretary, under by-law 249. He had no right to forward to the supreme secretary any payments made by members who had been suspended until their

reinstatement had been completed. His knowledge of the by-laws appears to have been incomplete, for immediately upon receiving the \$1.84 for the arrears due by the deceased, instead of paying it to the court treasurer, as required by the by-laws, with whom it should have remained pending the medical examination, he sent it direct to the supreme secretary. Now that official was aware from his books that the deceased had become suspended on 1st March, and being the medium of correspondence between the central body and the subordinate court, he must also have been aware that he had not been reinstated according to the by-laws; he had no authority under these by-laws to receive any money from suspended members who had not been properly reinstated, but he must be taken to have known that it was not contrary to the by-laws for the secretary of the subordinate court to receive arrears from suspended members pending their complete reinstatement; and therefore, instead of doing that which would have been the proper and prudent course under the circumstances, and returning the amount at once to the secretary of the subordinate court, he carried it to the credit of the subordinate court, and simply acknowledged receipt of it as "endowment assessment for April of J. Wells." If Dr. Wells had been at this time in a state of health which would have enabled him to effect a new insurance, I think this action of the supreme secretary would have afforded strong ground for urging against the defendants that they were estopped from denying that the money had been accepted by them with the intention of keeping the policy alive, and of waiving their right to require the assured to undergo the medical examination. The question as to the authority of the supreme secretary to waive the medical examination would not have arisen upon this contention, because the executive council or board of directors of the defendants must have vested in them an authority to waive such an examination, and the deceased would have been entitled to assume that they had done so from the fact that their mouthpiece, the supreme secretary, had practi-

Judgment.

STREET, J

Judgment.

STREET, J.

cally informed him that he was reinstated. But no such contention is open to the plaintiff here, because it is evident that at the date (April 29) when the supreme secretary wrote this receipt Dr. Wells was hopelessly ill, and in fact almost at the very point of death, for he died on the 6th May and his disease had visibly and daily become worse since the middle of the previous February. The question must therefore, be decided upon the ground not of estoppel but of waiver, and treating it under that head I can find nothing in what was done by the supreme secretary as shewing an intention to accept this payment absolutely as from a member in good standing, for he carried it to an account which was in fact, so far as this payment is concerned, a suspense account, awaiting the completion of the other steps necessary for the reinstatement of the deceased.

In the case of waiver, where the element of estoppel does not come in, I think it is open to the defendants to require the plaintiff to prove the authority of the officer who is alleged to have waived the defendants' rights and to insist that, in the absence of such proof, the alleged waiver cannot be held to have taken effect.

The defendant corporation is governed by an executive council elected by the delegates from the subordinate courts at the annual meeting; the supreme secretary is a member of this council. The duties of the supreme secretary are set out in by-law 19; he is there authorized and required (sec. 4) to perform all duties relating to the endowment funds, *as directed in the laws of this supreme court* (sec. 6). He is to keep a record of the membership, of the courts, of the names of the beneficiaries, and the amount of their policies, (sec. 9.) He is to keep a correct account between the supreme court and the subordinate courts (sec. 10.) He is to receive and pay over to the supreme treasurer all money due the supreme court (sec. 15). He is to examine all notices sent him of assessments forwarded and if incorrect notify forthwith the court from which the money was sent and have the same corrected (sec. 21). Perform such other and further duties as may from time

to time be required by the supreme court or by the executive council, or by the supreme chief ranger, who is the head of the order. He is, in fact, a somewhat subordinate member of the executive council, with powers which, as between himself and the corporation, are strictly limited and defined, and give him no power to dispense with any of the forms and ceremonies prescribed by the by-laws, but on the contrary are strictly limited by them. In favor of a person who has been induced by circumstances upon which he had a right to rely, to deal with an agent under the belief that the agent possessed a certain authority, and has acted on such belief, that authority, although not existing in fact, is constantly treated as existing, in order to avoid injustice or give effect to a contract. But this principle is not to be extended to cases in which the belief as to the existence of the authority has not been acted on; it would be carrying it beyond reasonable limits to imply an authority in the agent which never existed, for the purpose of giving effect to an intention on the part of the principal which was never entertained.

Judgment.

STRENT, J.

Here the act relied upon as a waiver, viz., the retention of the money, was the act of the supreme secretary alone, never communicated to or ratified by the executive council during the few days which elapsed before the death of Dr. Wells, and explained away by the supreme secretary almost immediately afterwards in a manner which his entries of the money fully bear out. I think upon the whole that there was neither the intention nor the authority on the part of the supreme secretary to waive the medical examination, and that if the intention did exist, the authority did not.

The result appears to me to be this: that the plaintiff is only entitled under the policy in case her father was a member in good standing at the time of his death; that he was not in good standing at the time of his death, because the acts necessary, under the by-laws by which he was bound, to bring him within that description had not

Judgment. been done by him, and their performance had not been
STEELE, J. waived by the defendants.

I think, therefore, that the action fails; but, as the plaintiff has been led by the action of the supreme secretary and the officers of the court below, to believe that her father had been restored to his standing in the order before his death, the defendants should not recover costs against her.

ARMOUR, C. J. :—

I agree that there was no waiver or estoppel, and in the result.

Action dismissed, with costs.

[CHANCERY DIVISION.]

RE ZOOLOGICAL AND ACCLIMATIZATION SOCIETY OF
ONTARIO.*Company—R. S. O. ch. 157—Stock—Subscription—Contributory—Allotment*

By sec. 2, sub-sec. 6 of the Ontario Joint Stock Companies Letters Patent Act, "shareholder" means "every subscriber to or holder of stock in the company."

After incorporation of a company under the above Act, R. S. O. ch. 157, the appellant signed a share subscription book with the following heading: "We the undersigned do acknowledge ourselves to be subscribers to the capital stock of the company for the number of shares, and to the amount set opposite our names; and we do hereby covenant, promise and agree, each with the other of us * * to pay the amount of said subscriptions and all calls thereon, when and as the same may be called up under the provisions of the Joint Stock Act, or under any by-law which may be passed." No stock was ever allotted to the appellant, and on winding up proceedings, he disputed his liability as a contributory.

Held, that the above formed a complete and absolute engagement with the company and the other signatories, and bound the appellant.

Semble. Had no stock been given to the signers of the above agreement, they could have enforced it specifically.

THIS was an appeal from the ruling and order of the *Statement*. Master-in-Ordinary, made in the course of the winding-up proceedings of the above society, whereby he had placed one E. S. Cox upon the list of contributories.

The appellant, Cox, had subscribed for shares after the incorporation of the company, under the circumstances mentioned in the judgment.

The appeal came on for argument on March 28th, 1889, before Boyd, C.

A. C. Galt, for the appellant. Our contract for shares was purely conditional: "We request the number of shares opposite our respective names to be allotted to us." But the Master has held that this is not a conditional contract. It was not shewn there was any allotment. I rely on:—*Re Queen City Refining Co.*, 10 O. R. 264; *Lake Superior Navigation Co. v. Morrison*, 22 C. P. 217; *Reid-path's Case*, L. R. 11 Eq. 86; *Gorrissen's Case*, L. R. 8 Ch. 507; *Nasmith v. Manning*, 5 S. C. R. at p. 445; *Denison v. Leslie*, 3 A. R. at p. 545; *Nicol's Case*, 29 Ch. D. 421; *National Insurance Co. v. Egleson*, 29 Gr. 406.

Argument.

W. F. W. Creelman, for the liquidator, referred to *Portal v. Emmens*, 1 C. P. D. 664; *National Insurance Co., v. Egleson*, supra; *Re Central Bank, Nasmith's Case* 16 O. R. 293, 301, and cases there cited; *Port Dover & Lake Huron R. W. Co. v. Grey*, 36 U. C. R. 425; *East Gloucestershire, etc. R. W. Co. v. Bartholomew*, L. R. 3 Ex. 15; *Re Scottish Petroleum Co.*, 23 Ch. D. 413, 427.

Galt, in reply, cited Pollock on Contracts, 3rd ed., p. 31; *Wylson v. Dunn*, 34 Ch. D. 569.

April 1st, 1889. BOYD, C.:—

The appellant signed in the company's subscription book for twenty shares, equal to \$500. This company is incorporated under the Ontario Joint Stock Companies' Letters Patent Act, R. S. O. 1887, cap. 157. By sec. 2, sub-sec. 6: "Shareholders shall mean every subscriber to or holder of stock in the company." That is every subscriber to stock in the company shall be a shareholder therein. Cox subscribed to stock or to take stock in the company, by signing the subscription book of the company under the following agreement: "We the undersigned do acknowledge ourselves to be subscribers to the capital stock of the company for the number of shares and to the amount set opposite our names, and we do hereby covenant, promise and agree each with the other of us * * to pay the amount of said subscriptions and all calls thereon, when and as the same may be called up under the provisions of the Joint Stock Act, or under any by-law which may be passed." That is a complete and absolute engagement with the company and with the other signatories which binds the appellant. The closing clause of the agreement by which they request the number of shares for which they subscribe to be allotted to them, does not render the engagement conditional on the allotment of stock. If the stock was not given to them, each could enforce the engagement specifically, and needed to do nothing more to perfect the agreement.

Judgment.
BORD, C.

The agreement is to pay the amount of the subscription and all calls, when and as the same may be called up under the Act of incorporation. This Act in sec. 79 declares that the company shall be subject to the provisions of any Act of the Legislature for the winding-up of joint stock companies.

In *Nasmith v. Manning*, 5 S. C. R. 447, the subscription was drawn to pay calls "upon allotment of stock," and it was held that till the completion of allotment there was no liability. Here are no such suspensive words. The case is covered by my decision in *Campbell's case*, in which the same words of subscription were used: *Re Queen City Refining Co.*, 10 O. R. 264.

I dismiss the appeal with costs. I may further observe that it is satisfactory to find these decisions in accord with that of the *European R. W. Co. v. McLeod*, 3 Pugsley 3, in which the present Chief Justice of the Supreme Court of Canada participated, and wherein the English cases are fully discussed. Of this case I was not aware, but I may refer to it as very clearly embodying all that need be said to satisfy the appellant that he ought not to succeed. See also *Kingston Street R. W. Co. v. Foster*, 44 U. C. R. 552.

A. H. F. L.

[This case has been carried to the Court of Appeal.]

[CHANCERY DIVISION.]

RE SPROULE, SHARP V. SPROULE,

*Will—Construction—Devise “if my father does not alter his will”—
Legacies—Vesting.*

A testator by his will provided that in case his father did not revoke his will and so deprive him (the testator) of certain lands therein devised to him, then he (the testator) devised to S. certain lands, but in the event of his father altering his will and depriving him (the testator) of the lands therein devised to him, then he devised the said land otherwise.

He then bequeathed pecuniary legacies to certain of his children, adding in the case of those of them who were under eighteen, the words, “to be paid to them when they come of age,” and concluding, “I do hereby authorize and direct my said executors to invest the moneys devised to my children in good legal securities, until they arrive of age, and the interest obtained from such investment to be paid to my wife to assist her in supporting and educating my family.”

The father of the testator did not revoke or alter his will in the way referred to, but the testator pre-deceased him.

Held, that the words relating to the alteration of his will by the father of the testator must be construed as meaning that if the testator became the owner of the lands devised in his father's will, so that he could have a disposing power over them, then that they should go in the manner mentioned.

Held, also, that the pecuniary legacies were all of them vested; and that the legacy left to each child which did not attain twenty-one within the year after the testator's death, was to be invested until each child came of age, and the interest up to the several times when they should each attain twenty-one, should be applied in assisting the widow or mother to maintain and educate such child or children, and as each child attained twenty-one he or she would be entitled to be paid their respective legacies.

Statement. THIS was an action for the construction of the will of John Henry Sproule, deceased, full particulars of which are set out in the judgment of ROBERTSON, J.

The matter came up on motion for judgment on January 30th, 1889.

F. A. Anglin, for the executors.

J. Hoskin, Q. C., for the infant children of the testator.

N. F. Paterson, Q. C., for the adult defendants.

The following authorities were cited on the argument; *Hawkins on Wills*, 2nd Am. ed., pp. 225, 235; *Hammond*

v. *Maule*, 1 Coll. 281; *Hanson v. Graham*, 6 Ves. 238; *Argument. Branstrom v. Wilkinson*, 7 Ves. 420; *Bigelow v. Bigelow*, 19 Gr. 559.

February 14th, 1889. ROBERTSON, J.:—

This action is brought by the executors of the late John Henry Sproule, for the construction of his will, and for the administration of his estate; and the statement of claim contains an allegation to the effect that the provisions contained in the various paragraphs of the will, are, if not inconsistent, at least of doubtful effect, and render it unsafe for the plaintiffs without the advice and direction of the Court to proceed to a distribution of the personal estate.

The second paragraph of the testator's will is in these words :

"In case my father does not revoke his will and deprive me of the lands therein devised to me, I will and devise to my son John James Sproule and his heirs, the east half of lot No. 17, and the west forty acres of lot 18, in 12th concession of the township of Brock, except thereout twenty acres off of the south end of said above parcels.

The third paragraph is in these words :

"I will and devise to my son William Adelbert Sproule and his heirs the above twenty acres off of the south end of the east half of lot No. 17, and of the forty acres of said lot No. 18, in 12th concession, &c.

The fourth paragraph is in the words following :

"Fourth.—I will and devise to my wife Eleanor Sproule all that part of lot No. 19 south of Beaver River, in the 12th concession of Brock, and in the village of Cannington, to hold and enjoy until my son William Adelbert Sproule comes of age; and then in the event of my father not depriving me of the lands devised to me in his will now made, then to my son William Adelbert Sproule and his heirs; but in the event of my father altering his will and depriving me of the lands therein devised to me, then I will and devise the said above parcel of land to my wife, to hold during her natural life, and after her decease, to be equally divided among all my children.

"Fifth.—I will and devise to my daughter Naomi Sproule, the sum of two hundred dollars.

"Sixth.—I will and devise to my daughter Elizabeth Ann Sproule the sum of two hundred dollars.

Judgment. "Seventh.—I will and devise to my daughter Sarah Jane Sproule the sum of two hundred dollars.

ROBERTSON, J. "Eighth.—I will and devise to my daughter Malinda the sum of three hundred dollars.

"Ninth.—I will and devise to each of my daughters Mary Sproule, Philena Sproule and Ada Maria Sproule, the sum of two hundred dollars, to be paid to each of them by my said executors when they come of age.

"Tenth.—I will and devise to my son Albert Henry Sproule the sum of one thousand dollars, to be paid to him when he becomes of age.

"Eleventh.—I will and devise to my son Nassau Chetwood Sproule the sum of one thousand dollars, to be paid to him when he becomes of age.

"Twelfth.—I will and devise to my wife Eleanor Sproule, all the rest and residue of my personal estate and effects which I may die possessed of or entitled to under my father's present will.

"Thirteenth.—And I do hereby authorize and direct my said executrix and executor to invest the moneys devised to my children, in good legal securities until they arrive of age, and the interest obtained from such investment, to be paid to my wife to assist her in supporting and educating my family."

The children to whom the moneys were bequeathed were of the ages respectively at the time of their father's death Naomi, about 24 years; Elizabeth Ann, about 22 years; Sarah Jane, about 20 years; Malinda, about 18 years; Mary Eleanor, about 15 years; Philena, about 13 years; Albert Henry, about 10 years; Ada Maria, about 10 years; Nassau Chetwood, about 6 years.

The will bears date on 14th January, 1882, and the testator died in the following month of February.

The land mentioned in the 4th paragraph, to wit, lot No. 19, south of Beaver River in the 12th concession of Brock, and in the village of Cannington, is now and has been in the possession of the defendant Eleanor Sproule who has been in receipt of the rents and profits of the same since the death of the testator. The father of the said testator died on or about the 25th day of March, 1882, his said son predeceasing him by about one month. John Sproule, the father of the testator, did not alter his last will and testament in the last will of his said son referred to, nor did he deprive his said son of the lands to him devised in and by said will made in the year 1870, and in the last will of the testator mentioned, but the same did not pass to the

said testator, by reason of his predeceasing his said father, nor to his children under the provisions of his said father's will and his own will. The testator's two sons John and James Sproule and William Adelbert Sproule did not obtain the lands devised to them in and by the second and third paragraphs of the will of their said father for this reason, and also because of a paramount title to the said lands asserted and maintained by their uncle Philip Sproule, brother of said John Henry Sproule, deceased.

Judgment.
ROBERTSON, J

The inconsistencies, &c., are set out as follows :

The fifth, sixth, seventh, and eighth paragraphs appear to give the legatees therein named vested interests with rights of payment immediately upon the death of the testator, the ninth paragraph appears to give to the legatees therein named vested interests with right of payment only on their all having attained the age of twenty-one years ; and the tenth and eleventh paragraphs appear to give the legatee in each of such paragraphs named, a vested interest with right of payment on his attaining the age of twenty-one years, whereas the thirteenth paragraph appears to contemplate retention by the executor and executrix of all the said legacies in said paragraphs bequeathed, until all the said children of the testator shall have come to the age of twenty-one years, and seems to give to the infant children of the testator and to his widow an interest in the proceeds of such legacies therein directed to be invested for the purposes in said thirteenth paragraph of said will specified ; and also seems to impose upon the said executor and executrix a duty to retain and invest the amounts of such legacies until the time when the youngest child comes of age as aforesaid.

“Moreover the various provisions in said paragraphs of said will, numbered 5, 6, 7, 8, 9, 10, 11, and 13, render the rights of the various parties therein named to the interest accrued upon the amounts of said legacies in the hands of the plaintiff, John Sharpe, uncertain and dubious, and the plaintiffs are unable with safety, without the advice and direction of this Honourable Court to pay the same over either to the legatees or to the defendant, the widow Eleanor Sproule, not knowing to whom such interest which is a very considerable sum rightly belongs.

“Moreover the loss of the lands devised in the second and third paragraphs of said will to the defendants John James Sproule and William Adelbert Sproule, and more especially the manner in which such loss happened, renders doubtful the effect and operation of the fourth paragraph of said last will and testament, and it is uncertain whether under said paragraph the land therein devised, belongs to the said Eleanor Sproule only until her son William Adelbert becomes of age, or whether she has a life interest therein, and also whether the said William Adelbert Sproule owns the reversion in fee of the same dependent only upon his attaining the age of twenty-one years, or whether the same belongs to all the

Judgment. children of the testator, defendants in this action, subject only to a life interest therein of their mother Eleanor Sproule.
ROBERTSON, J.

I will consider the question which relates to the devises of the real estate first :

The testator seemed to think, when he made his will, that the only contingency in the way of his becoming the owner of the lands devised to him by his then living father, was that his father might change his will ; he was not advised as to how that devise would be affected by his predeceasing his father—nor did he apparently take into account, the paramount title, although he had in his mind the possibility of legal proceedings being necessary to a recovery of possession after his father's death, because he made a direction as to funds being supplied for that purpose ; but, however that may be, in my judgment, the testator had in his mind only, that in case the land mentioned in his father's will as being devised to him, should come to him, then in that case, it should go to his two sons, John James, and William Adelbert. The latter in that case would also take, on obtaining his majority, all that part of Lot 19, south of Beaver River in the 12th concession of Brock, and in the village of Cannington, in fee, his mother being entitled, until he became 21 years of age, failing that, the testator intended that the last mentioned property, should go to his widow for life, remainder in fee to all his children, as tenants in common.

I don't think the words in the testator's will limiting the devise to William Adelbert, but "*in the event of my father not depriving me of the lands devised to me in his will now made*, can be construed otherwise, than to express an intention in the testator's mind, that if he became the owner of these lands, so that he would have a disposing power over them, then that they should go to his two sons, in the manner mentioned. Consequently, in my opinion the devise to William Adelbert of the part of lot 19, was not intended to be contingent upon the father of the testator not *changing his will, thereby deriving him* of these lands, but merely if they came to him through and by

means of the devise which, at the time was contained in his father's will, so that the fact of his father having died without having changed his will, by any act or deed of his, would not nor could be construed, as intending to give to William Adelbert the part of lot 19, wholly to himself, at least that is the construction I am forced to give to this devise, although I confess to not being entirely free from doubt. It is doubtless a strange condition, which the testator has attached to this devise, inasmuch as William Adelbert not having taken his part of the lot devised to him, which was expected to come from the testator's father, he should not take the part of lot 19 either. The consequence is, that, although the testator evidently intended to deal more liberally by his two sons, John James and William Adelbert, than by his other children, because he gives only to each of the others, and there are eight of them, a legacy to the girls, from \$200 to \$300, and to the boys \$1,000. As it turns out, the eight other children receive, in addition, an equal share of the part of lot 19 in remainder with John James and William Adelbert, so that they are better off than the two whom the testator apparently intended to favour. The conclusion, therefore, that I have come to, is, that Eleanor Sproule, the widow takes an estate for life in that part of lot 19, mentioned in the will of the testator, with remainder in fee to all the children of the testator, as tenants in common. No authorities were referred to by counsel at the bar, nor have I been able to find any directly in point; but it appears to me that the intention of the testator was, as I have declared it. But there is the rule that an estate limited to commence on certain specified events, will fail altogether unless those exact events happen. No case, however, that I have been able to find is exactly the same in the circumstances as the one now under consideration; but it appears to me that the principles involved in *Archbold v. Austin, Gourlay*, 5 L. R. Ir. Ch. 214, are somewhat analogous—and there it was held, that if a testator recites that he will be entitled to property in certain events, and disposes of

Judgment.
ROBERTSON, J.

Judgment. it, if these events happen, *the property passes only if those events happen.*
ROBERTSON, J.

The remaining questions to be disposed of arise on the 5th, 6th, 7th, 8th, 9th, 10th, 11th, and 13th paragraphs of the will, and are :

Fi st—Are the several legacies mentioned, vested or contingent, and if the former, when are they payable ; that is, as each legatee attains his or her majority, or not until the youngest arrives at the full age of twenty-one years ?

In considering these questions it is important to keep the exact words of the several paragraphs relating to the legacies in mind, and especially these of the 13th, which are as follows : “ And I do hereby authorize and direct my said executrix and executor to invest the moneys devised to my children in good legal securities until they arrive of age, and the interest obtained from such investment to be paid to my wife to assist her in supporting and educating my family.”

It was contended by Mr. Hoskin, on behalf of the infants, that the intention is clear that the testator meant that the executor and executrix should create a fund, out of which the “ family ” should be maintained and educated, and that was to continue until the youngest child came of age.

On the other hand, Mr. Paterson argued that a contrary intention is clearly manifested on the face of the will. That as regards the daughters Naomi, Elizabeth Ann, Sarah Jane, and Malinda, they would each be entitled to be paid their legacy, at the expiration of one year after their father's death, because there is no time mentioned when these legacies are to be paid, and the whole of these legatees, except Malinda, would be 21 years of age at that time, and Naomi within two years thereafter. Then all the others being much younger, he particularly appoints that the legacy to each of them is to be paid to them when they severally become of age. It is worthy of notice that the testator directs in the 13th paragraph that the interest obtained from such investments is to be paid to his wife “to assist her” in supporting and educating the family

clearly indicating to my mind that the testator meant, or supposed that his wife, the mother of these children, should support and educate the family, in which, however, she was to be *assisted* by the interest so far as it would go. In *Bigelow v. Bigelow*, 19 Gr. at p. 555, Strong, V. C., says: that "every gift of maintenance must be taken to mean maintenance during minority," and that I understand to be the law beyond question, unless it is expressly stated to mean beyond that time. So that taking the words of the several bequests of the legacies in connection with the words before referred to, "*to assist her* (the wife), in supporting and educating the family," clearly mean, in my opinion, that the legacy left to each child which did not attain 21 within the year after the testator's death, was what was to be invested until each child came of age, and the interest up to the several times when they should each attain 21, should be applied in *assisting* the widow or mother to maintain and educate such child or children. As to the question whether these legacies are vested or contingent, I have no doubt they are one and all vested. The gift is to them, and each of them; the day of payment however, is postponed, so far as those who are under age, except Malinda, are concerned, until they respectively attain their majority. It would seem, therefore, that all those who are now of full age are entitled to be paid their respective legacies, and as each of the younger ones attain that age—he or she will be entitled in like manner to be paid the legacy left to him or her. I refer to *Hanson v. Graham*, 6 Ves. 239. The result is as above stated, and the plaintiffs should have their costs as between solicitor and client of the action up to this time out of the estate, and that all the other parties should also have their costs out of the estate. And I refer it to the Master in Ordinary to take the usual accounts in an administration suit. Further directions and costs of the reference to be reserved, etc.

Judgment.
ROBERTSON, J.

A. H. F. L.

[CHANCERY DIVISION.]

RE STURGIS, WEBLING V. VAN EVERY.

Will—Attestation—Legatee—Evidence—New attestation.

A will having been attested by one of the legatees, the solicitor for the testator, being present at the time, and apprehensive that the legatee was incompetent, signed the will himself, and procured another also to do so, but the name of the legatee was not struck out of the attestation clause.

Held, that evidence was admissible to prove the actual state of the case, and it thus appeared that the mistake of having the legatee as an attesting witness had been remedied, not by striking out her name, but by the parties proceeding to a new attestation and subscription of the will, and the legatee was therefore not incapacitated from taking under the will.

Statement.

THIS was an appeal on behalf of certain of the defendants, against an interim ruling of the Master of this Court at Brantford, made in the course of the administration of the estate of Samuel Sturgis, under the following circumstances :

It appeared that one of the legatees named in the will had subscribed as an attesting witness, and the question was, whether she could take under the will. The evidence shewed that after the said legatee had signed the will as witness, the solicitor for the testator being apprehensive that she was incompetent, signed the will himself as an attesting witness and procured another person also to do so, but the name of the legatee was nevertheless not struck out of the attestation clause.

The Master, however, held that the legatee could take under the will.

This appeal came on for argument on March 28th, 1889, before BOYD, C.

W. H. Blake, for the appellants. The Master was wrong to admit evidence of what was said and done: Theobald on Wills, 1st ed., p. 90. It is true that evidence is always admissible to shew whether there has or has not been an attestation; but it is not contended here that there was

not an attestation, and evidence is not admissible to prove Argument. what occurred subsequently. Revocation must be the deliberate act of the party who has attested; and can it be said that there was such a revocation that if there had been only one witness, the legatee would have been incompetent. I rely on *Little v. Aikman*, 28 U. C. R. 337; *Hopkins v. Hopkins*, 3 O. R. 223; *Re Sharman*, L. R. 1 P. & D. 661; *Randfield v. Randfield*, 30 L. J. Ch. at p. 179, 32 L. J. Ch. 669; *Re Mitchell*, 2 Curteis 916; *Griffith v. Griffith*, L. R. 2 P. & D. 300.

English, for the plaintiffs, contra. The evidence shews as a matter of fact that the legatee's signature was not a complete attestation: Jarman on Wills, 4th Eng. ed. p. 74; Theobald on Wills, 3rd ed., p. 27. Republication validates a gift to a witness, and what took place here amounted to a republication: *Anderson v. Anderson*, L. R. 13 Eq. 381.

April 1st, 1889. BOYD, C.:—

The character in which an apparent witness signs a will is open to discussion as a question of fact, even after probate. Such a point was under consideration in *Ryan v. Devereux*, 26 U. C. R. 100, and *Little v. Aikman*, 28 *ib.* 338. See also *Re Forest*, 2 Sw. & Tr 334. That is not the present question, which appears to be novel, so that I am not embarrassed or assisted by authority. Here the name of the beneficiary purports to be subscribed to the testimonium clause as the first attesting witness. This is evidence *prima facie* of such being the fact, but it is not conclusive evidence. After she had signed the solicitor discovered from the identity of name that she was also the beneficiary, and so not "a competent witness" as it is phrased in the evidence. But as I understand the whole transaction, and as the Master has found upon the evidence, her act of signature was disregarded and all parties intended to complete the transaction as if she had not signed, with the testator's knowledge and consent. A break thus occurred in their completing of the attestation

Judgment. of the instrument ; after the first witness signed and before
BOYD, C. a second subscribed the blunder or mistake was discovered, and was remedied not, as it should have been, by striking out her name, but by the parties proceeding to a new attestation and subscription of the will by two disinterested and independent witnesses. Leaving the first signature as was done has increased the difficulty of proof of the actual state of case, but it has not extinguished the right of the beneficiary by making this proof impossible.

Overrule this ground of appeal ; on whole appeal no costs.

A. H. F. L.

[CHANCERY DIVISION.]

RE McMILLAN.

Agreement—Power of those for whose benefit it is made to enforce same—Release.

In consideration of a conveyance to him of a certain farm, the petitioner agreed with his mother that he would, during her life, provide her with a house on the farm, and with necessaries, and support his brothers and sisters thereon, until they reached sixteen years of age, so long as they remained at home on the said farm, and assisted him so far as they were able in the management of it.

Held, that the mother had no right or power to release the petitioner from the obligations undertaken by him with reference to his brothers and sisters under the above agreement, and if the children did their part they could hold their brother to his promise, though the agreement was not in terms made with them as parties.

THIS was an application under the Vendor and Purchaser Act, made under the following circumstances :

On April 30th, 1886, John McMillan and Mary Jane, his wife, conveyed to Hugh McMillan, in fee simple, the lands in question, for an expressed consideration of the payment of a certain mortgage against the lands, and of a certain agreement by Hugh McMillan, of even date.

The agreement referred to was to the following effect :

“ The said Hugh McMillan covenants, promises, and agrees to and with his mother, the said Mary Jane McMillan, that he will during the natu-

ral life of the said Mary Jane McMillan, provide her with a house on said Statement. lands" (being the lands in question), "and also with food, clothing, and other necessities during her said life, and that he will support and maintain his brothers and sisters on the said farm until they severally attain the age of sixteen years, so long as they remain at home on the said farm, and assist him so far as they severally are able, in the care, work, and management of the said farm."

On October 25th, 1886, Mary Jane McMillan executed the following document under seal, endorsed upon the above agreement :

"In consideration of Samuel Williams advancing to Hugh McMillan within named, the sum of \$3,600 by way of mortgage upon the lands within mentioned, I do hereby release to the said Hugh McMillan, all my claim for support under this agreement, both for myself and for the children of the said John McMillan, and I hereby release the said Hugh McMillan of and from the agreement within mentioned."

On December 22nd, 1888, Hugh McMillan agreed to sell the land to John McGregor, who refused to complete the purchase, on the ground that the said surrender and release by Mary Jane McMillan was not sufficient in law to release and discharge the claims upon the lands of three of the brothers and sisters of Hugh McMillan, who were not of the ages of 16 years, and who on October 25th, 1886, the date of the said surrender and release, were and still were residing upon and assisting to work the said lands.

Hugh McMillan had at this time three brothers and sisters of the respective ages of 5, 11, and 13 years, and all residing upon the lands, and who had been residing thereon ever since April 30th, 1886.

Under these circumstances Hugh McMillan petitioned that it might be declared that the said surrender and release by Mary Jane McMillan to himself, was a proper and sufficient surrender and release of all the claims of the children of the said John McMillan under the said agreement, and that she had the power to so release the same, and that he might sell and dispose of the lands free from any claim or lien of the children of John McMillan under the said agreement or deed.

The petition came up for argument on January 16th, 1889, before BOYD, C.

Argument.

Hoyles, for the petitioner, cited Anson on Contracts, 5th ed., pp. 220, 221, 223; Watson's Compendium of Equity, 2nd ed. Vol. 1, p. 70; Pollock on Contracts, 4th ed., pp. 201, 202, 203, 204; *Re Empress Engineering Co.*, 16 Ch. D. 125, 129; *Gandy v. Gandy*, 30 Ch. D. 57; *Mitchell v. City of London Assurance Co.*, 15 A. R. 262.

No one *contru.*

January 16th, 1889. BOYD, C.:—

My opinion is, that the mother had no right or power to release the vendor from the obligations undertaken by him with reference to his brothers and sisters, as one of the conditions on which his father conveyed the land to him. The effect of the agreement between him and his mother is, that he engages himself to support and maintain his brothers and sisters on the farm till they severally attain 16 years of age, so long as they remain at home on the farm, and assist him in the working of it so far as they are able. If these children do their part, they can hold their brother to his promise in my judgment, though it is not in terms made with them as parties. The cases are collected and commented on in *Mitchell v. City of London*, 15 A. R. 271, *seq.*

I therefore decline to make the declaration sought.

A. H. F. L.

[CHANCERY DIVISION.]

HUTCHINSON V. THE CANADIAN PACIFIC RAILWAY
COMPANY.

Railways—Negligence—Contributory negligence—Travelling by freight train—Injury caused by shock of connecting cars—Getting into train before it is made up.

The plaintiff was going from I. to M. by train in charge of cattle. At T. the train on which he had come from I. was partly broken up, to be re-made with some cars which were standing on another track. While there the plaintiff, unknown to the defendants, went into the caboose at the end of the cars which were to be added to the cars from I., and when the connection was about to be made, deliberately stood up, and was washing his hands, when the shock of the connection caused the injury, for damages for which this action was brought.

Held, affirming the decision of ROSE, J., that there was no evidence of negligence on the defendants' part; and the mere fact of the accident happening to the plaintiff was not in itself sufficient evidence of negligence.

Held, also, that there was evidence of contributory negligence, in that the plaintiff knew that he was in a freight train, where there would not be so much care shown, and yet stood up, instead of sitting down, as he might have done, while the connection was being made, especially as he entered the caboose before the train was made up, and had no reason to think that the defendants knew that he was there.

THIS action was brought by Donald Hutchinson against ^{Statement.} the Canadian Pacific Railway Company, claiming \$2,000 damages in respect of injury alleged to have been sustained by him through the negligence of the defendants and of their engine driver, under the circumstances which are sufficiently set out in the judgment of FERGUSON, J.

The action came on for trial before ROSE, J., and a jury at Woodstock, on November 8th, 1887.

The jury disagreed in respect to their verdict, but leave was reserved to the defendants to move in Toronto to dismiss the action on the ground that there was no evidence to go the jury, which they subsequently did on April 16th, 1888, and on June 2nd, 1888, ROSE, J., delivered judgment dismissing the action, as follows:

ROSE, J.—This case was tried before myself and a jury at Woodstock, at the Fall Assizes of 1887. Questions were

Judgment. submitted to the jury, but they did not agree upon the findings.
ROSE, J.

The defendant company moved for judgment on the ground that there was no evidence to go to the jury, and I reserved leave to make the motion after the jury had answered the questions.

It is said that the motion was not made, or the leave reserved early enough in the trial. Counsel differ as to the fact, my own notes are silent on the point, and the reporter's notes are not very clear.

The question becomes of little moment, as counsel inform me that in any event the judgment will be reheard before the Divisional Court, and if there is any doubt as to my jurisdiction to hear the motion, no such doubt can be raised as to the jurisdiction of the Divisional Court.

On the facts as disclosed at the trial, I am of the opinion that no case was made out entitling the plaintiff to have the case submitted to the jury.

It may be open to argument whether any invitation was shewn to enter the caboose while the train was being made up. It seems to me clear no invitation was extended to the plaintiff to enter the caboose, and stand and wash, or attempt to wash his hands during such time.

The plaintiff knew that the engine was backing down with several cars to take up or take on the caboose. He was an old traveller on such trains, and knew when the cars ran against the caboose there would be a jar or shock, and elected during this time to remain standing in an attempt to wash his hands and to receive the shock while standing, relying upon his ability to sustain his position by bracing himself when the shock should come.

Those in the management of the train did not, as a fact, know he was in the caboose. The only fact that would or rather could possibly have given them notice that he might be there, was that the cattle were in cars forming part of the train.

It would be going a long way to hold that to be evidence of his being in the caboose while the train was being made up; and as it seems to me it would be going immeasurably farther to hold that it was evidence of knowledge that not only was he in the caboose, but also was standing up and washing his hands.

This case seems to me an attempt to carry the law as to the liability of carriers farther than any decided case, and I do not think it can be successful.

In my opinion no verdict in favour of the plaintiff could be allowed to stand, and, therefore, I think judgment should be entered for the defendant company, dismissing the plaintiff's action, with costs.

Judgment.

ROSE, J.

The plaintiff then moved by way of appeal to the Divisional Court, and the motion came on for argument on December 14th, 1888.

Wallace Nesbitt, for the plaintiff. The sole question for the jury here is, whether the company were guilty of negligence, and on this point I refer to *Wakelin v. London and South Western R. W. Co.*, 12 App. Cas. 41; *Metropolitan R. W. Co. v. Wright*, 11 App. Cas. 152; *Directors of Dublin, Wicklow, and Wexford R. W. Co. v. Slattery*, 3 App. Cas. 1155; *Wilton v. Northern R. W. Co.*, 5 O. R. 490; *Davey v. London and South Western R. W. Co.*, 12 Q. B. D. 70. As to the right of the plaintiff to get on when train was not at the platform: *Wood on Railway Law*, vol. 2, pp. 1046, 1047; *Watson v. Northern R. W. Co.*, 24 U. C. R. 98; *McDonald v. Chicago and North Western R. R. Co.*, 26 Iowa 124; *Hartwig v. Chicago and North Western R. R. Co.*, 49 Wis. 353. It makes no difference whether there was an invitation to enter or not: *Wood on Railway Law*, vol. 2, p. 1046. The fact of his standing was not negligence: *Gee v. Metropolitan R. W. Co.*, L. R. 8 Q. B. 161; *Wood v. Lake Shore and Michigan Southern R. W. Co.*, 49 Mich. 370; *Wood on Railway Law*, vol. 2, p. 1163. The evidence could not be withdrawn from the jury: *Slattery's Case*, 3 App. Cas. 1135; *Wakelin v. London and South Western R. W. Co.*, 12 App. Cas. 41; *Metropolitan R. W. Co. v. Wright*, 11 App. Cas. 152; *Lewis v. Brown*, 10 A. R. 639. It makes no difference to the liability of the company whether there was an invitation to enter or not: *Wood on Railways*, (2) vol. p. 1046; *Watson v. Northern R. W. Co.*, 24 U. C. R. 98. A railway company is bound to give notice if they are about to cause a jerk to a train: *Fordham v. London, Brighton, and South Coast R. W. Co.*,

Argument.

L. R. 4 C. P. 619; *Bridges v. North London R. W. Co.*, L. R. 7 H. L. 213; *Nicholson v. Lancashire and Yorkshire R. W. Co.*, 3 H. & C. 534; *Richardson v. Metropolitan R. W. Co.*, 37 L. J. C. P. 176, 18 L. T. 721.

Aylesworth, for the defendants. We do not quarrel with the plaintiff's law, but with his facts. See, however, *Davey v. London and South Western R. W. Co.*, 12 Q. B. D. 70. The plaintiff was in a cattle train and therefore should have expected less care and convenience: *March v. Concord Railway Corporation*, 9 Foster (New Hampshire), at p. 42; *Galena and Chicago Union R. W. Co. v. Fay*, 16 Ill. 558; *Chicago, Burlington and Quincy R. W. Co. v. Hazzard*, 26 Ill. 373; *Ohio and Mississippi R. W. Co. v. Dickerson*, Ind. 317; *Harris v. Hannibal, etc. R. W. Co.*, Hamilton's Am. & Eng. R. R. Cases, vol. 27, p. 216.

Nesbitt, in reply, cited *Bridges v. Directors, &c., of the North London R. W. Co.*, L. R. 7 H. L., at p. 222, 234; *McGibbon v. Northern R. W. Co.*, 14 A. R. 91.

December 15th, 1888. FERGUSON, J.:—

It was incumbent upon the plaintiff in this case to establish by proof that the injury of which he complained was caused by some negligence of the defendants. Some negligent act, or some negligent omission to which the injury was attributable. That was the fact to be proved. If that fact was not proved, the plaintiff should fail; and if in the absence of direct proof, the circumstances which were established were equally consistent with the allegation of the plaintiff as with the denial of the defendants, the plaintiff should fail.

It appears that the plaintiff was shipping cattle upon the defendants' railway from Ingersoll to Montreal, and that he was entitled to his passage on the train on which the cattle were being carried. This train arrived at Toronto, at which place there was a change of conductors, and the train was made up, or was being made up, of this one, or a part of it, and five additional cars, four of which were

freight cars, and the other one what was called the "caboose." These five were on a track different from that on which was the train that had come from Ingersoll, the caboose being the rear one. In making the connexion between these five cars and the train, or a part of it that had come from Ingersoll, the defendants backed the train towards and to these five cars, and thus made the connexion. Judgment.
FERGUSON, J.

The plaintiff had made some inquiries from the conductor that had come from Ingersoll, as to where the caboose was in which he was to proceed to Montreal, and was told to make inquiry of some persons who were at or near the place (the station), and was by them shewn the caboose, into which he went. This was the proper one, but so far as appears, it was wholly unknown to any of the officers or servants of the defendants, who were then managing the train, that the plaintiff was there.

What the plaintiff complained of is, that the defendants in effecting this coupling negligently ran the train with such speed and force against these five cars—or rather the end one of them—as to cause an extraordinary concussion, an effect of which was to throw him off his feet where he was in the caboose, and against some objects therein, whereby, as he says, he sustained the injury.

The direct evidence given by the plaintiff to prove this alleged negligent act of the defendants, is confined to the evidence of the facts that this connection was made; that he, the plaintiff, was thrown off his feet in the manner described; and that a teapot fell, or was thrown off a stove in the caboose. There was, it appears, no other person in the caboose at the time. Counsel for the plaintiff seemed to me to be driven on this part of the case to assert that the bare fact that the accident to the plaintiff occurred sufficiently shewed that there was negligent conduct on the part of the defendants in effecting this coupling of the cars, or parts of train, or intended train. I am not of this opinion, and I think the plaintiff in giving his evidence failed to prove this very important matter.

Judgment.

FERGUSON, J. It has often been said that propositions of negligence, and contributory negligence in cases of the character of the present one, are so interwoven as that contributory negligence, if any, is generally brought out and established in the evidence of the plaintiff's witnesses.

In the evidence given by this plaintiff, it is shewn that he entered this caboose before the train was made up; that he had been shewn the track upon which the other part of the train would come to make the connexion; that he knew it was coming; that he heard it coming; that he desired to wash himself in the caboose; that the place for washing therein was only a few feet—four or five feet—from a seat or place to sit down; and there was no pretence that he would have sustained any injury if he had been sitting there instead of standing as he was; that he considered the matter as to whether he should have sufficient time to complete the washing before the connexion; and that he thought he had, but was mistaken in this, and before sitting down, and while he was still standing and washing, the concussion of the connexion occurred.

The plaintiff knew that he had his passage upon a freight train, a train upon which cattle were being carried, and that he was to ride in the caboose. He had often before ridden in the same way. He could not have expected, or should not have expected, or had no right to expect, that the management of such a train would be accomplished in as easy and as smooth a manner, and with as little roughness as that of a passenger train, or a train of Pullman cars; and his duty was to accommodate the amount of his own care and caution to the situation in which he was, and especially as he had entered the caboose before the train was made up, and had no reason for thinking that those who were managing the train had any knowledge that he was in this caboose; and I cannot avoid being of the opinion that on the evidence given by the plaintiff himself, it appears that he was guilty of what is commonly called contributory negligence.

Then, when the plaintiff even where he succeeds in proving the alleged negligent act on the part of the defendants, at the same time shews, in giving his evidence, that he himself was guilty of contributory negligence, his case fails, because he does not succeed in proving that the negligent act or acts, or omissions of the defendant caused the injury.

In this case, however, as I have already said, I am of the opinion that the plaintiff's evidence did not prove the alleged negligent act or conduct of the defendants, and I do not think there was evidence given by the plaintiff that should have been submitted to the jury.

In the argument counsel for the plaintiff—as he had a right to do—called to his aid the evidence given by the defendants. This evidence, however, so far as it has relation to the alleged negligent conduct of the defendants is, that the coupling on this occasion was effected in the same manner, and with no greater force or concussion than such couplings, or couplings on such trains, are ordinarily, if not always, done by the defendants, and there is no evidence shewing, or going to shew, that the defendants do not effect such couplings in the same manner as other railway companies do, and the presumption is, I think, against their doing it continuously in a negligent manner, so that the plaintiff's case is not aided or helped by the defendants' evidence, but, the contrary of this.

I am for these reasons of the opinion that the case is one in which a nonsuit might properly have been entered, and that on the merits the judgment is right, and should be affirmed, with costs.

BOYD, C., and PROUDFOOT, J., concurred.

[Affirmed by the Court of Appeal.]

[COMMON PLEAS DIVISION.]

IN RE BYRNE AND THE CORPORATION OF THE TOWNSHIP OF
ROCHESTER.

Municipal Corporations—Drainage—Compensation—Municipal Act
R. S. O. ch. 184, secs. 591-2.

The owner of certain lands in the defendant's township through which a drain had been made by them under the drainage sections of the Municipal Act, made a claim for damages, upon which an arbitration was had and compensation awarded him, it being shewn that it would be necessary to construct a bridge to cross his farm; to put up and maintain flood gates; and that he was deprived of about three and a half acres of land.

Held, that the case came within secs. 591-2 of the Municipal Act, under which he was entitled to the compensation awarded, which must be assessed on the lands liable to assessment for the drainage work.

Statement. THIS was an appeal from an award under The Municipal Act.

Byrne was the owner of a certain lot in the township of Rochester, through which a drain constructed under the drainage sections of the Municipal Act passed, and had been a petitioner with others, for the construction of a drain in the said township, which was similar in its purpose to the drain constructed, but the council had not given effect to the petition in which he joined, but subsequently on a petition in which he did not join passed a by-law for proceeding with the work.

After the drain had been constructed he made a claim against the corporation for compensation for the land taken for the purpose of the drain, and for the damages sustained by him in consequence of its construction which, according to his contention, made it necessary for him to erect flood-gates and bridges to connect his lands on either side of the bridge. An arbitration was held under the Municipal Act, and he was awarded damages.

In Michaelmas Sittings, 1888, *Meredith Q.C.*, supported the motion. The evidence shews that the result of the construction of the drain was upon the whole to benefit the

claimant's lands, and he is therefore not entitled to compensation. See sec. 483 which gives compensation only when the damages exceed the advantage derived from the work. Argument.

Douglas Q.C., contra. Sec. 591 alone applies; under that section no allowance is to be made for the benefit to the claimant from the work: *Hodgson v. Bosanquet*, 15 O. R. 589.

March 8th, 1889. GALT, C. J.:—

The principal question we have to decide is, whether this claim is made under sec. 483 of the Municipal Act, R. S. O. ch. 184, as contended for by Mr. Meredith, or under sec. 591, as asserted by Mr. Douglas.

If the claim is under sec. 483, then unquestionably the principle involved is very important, although the amount in dispute is not large, because the amount awarded would be a tax on the municipality generally; but if under sec. 591 it would not be so, as by sec. 592 any sum so awarded "shall be charged pro rata upon the lands * * * liable to assessment for such drainage works."

In my opinion the award was under sec. 591. Section 591 is one of the provisions of Title iii. of the Municipal Act. The by-law under which the work was done is in the form therein given, and both are under the heading "Drainage Works."

Section 591 enacts: "If any dispute arises between individuals, or between individuals and a municipality * * * as to damages alleged to have been done to the property of any individual in the construction of drainage works consequent thereon, then the municipality, or individual complaining, may refer the matter to arbitration, as provided in this Act."

It is manifest from the foregoing that the dispute must have arisen after the completion of the work, and could not, therefore, have entered into the consideration of the engineer in prospectively estimating the cost of the work.

Judgment.

GALT, C.J.

The case before us comes clearly within this clause. The arbitrators have found that it will be necessary for the respondent to construct a bridge so as to enable him to cross from one part of his farm to the other. It will also be necessary for him to put in and maintain flood gates; and, lastly, that he has been deprived of the use of about three and one-half acres of his land.

Section 592 thus provides: "That any sum of money that may be required to enable the corporation to comply with any such * * award made in respect thereof, shall be charged *pro rata* upon the lands, * * liable to assessment for such drainage works." In other words, the damages sustained shall be added to what was thought to be the original cost of the work.

As this case comes plainly within these provisions, this appeal must be dismissed with costs. See the case of *Hodgson v. Corporation of Bosanquet*, 15 O. R. 589, which, so far as the claim for damages is concerned, is very like the present.

MACMAHON, J., concurred.

ROSE, J., not having been present at the argument, took no part in the judgment.

[CHANCERY DIVISION.]

RE METCALFE.

*Canada Temperance Act—Voters—Repeal—Indians—Indian reserves—
R. S. O. 1887, ch. 5, sec. 1—R. S. C. ch. 106, sec. 12.*

Held, that Indian electors resident in the township of Tuscarora, in the county of Brant, being an Indian reserve, had no right to vote upon the question of repeal of the Canada Temperance Act in that county. *Seemle*, that R. S. O. 1887, ch. 5, sec. 1, is to be interpreted as meaning that the townships named shall be townships for municipal purposes, when it becomes possible to make them such, as, *e. g.*, in such a case as the present, when the Indians become enfranchised. The Canada Temperance Act can have no operation where the Indian Act is in force.

R. S. C., ch. 106, sec. 12, refers to white men, but not to Indians.

THIS was a motion for a prohibition against Mr. Bullock, *Statement.* the returning officer appointed to take the vote upon the question of repeal of the Canada Temperance Act, R. S. C. c. 106, in the county of Brant, prohibiting him from receiving the votes of the electors resident in the township of Tuscarora, in the said county, or of those possessing only the special Indian Franchise conferred by the Electoral Franchise Act, R. S. C., ch. 5.

The township of Tuscarora is an Indian reserve under the Indian Act, and possessing no form of municipal government. The Canada Temperance Act had been brought into force in the county of Brant, pursuant to the provisions of that Act. The questions, therefore, arose whether the township of Tuscarora is a part of the county of Brant for municipal purposes, it being a part of such county territorially; and also, whether, seeing that the Indian Act, R. S. C. c. 43, provides a liquor law itself more stringent than the Canada Temperance Act, R. S. C. c. 106, the Indians were bound by the prohibitory provisions of the former Act, and had no voice as to the introduction or the subsequent repeal of the less stringent Canada Temperance Act.

The present motion came on for argument on March 25th, 1889, before BOYD, C.

Argument.

A. H. Marsh, for the applicant. We contend that R. S. O. c. 5, s. 1, in so far as it includes Tuscarora in the county of Brant for municipal purposes, is *ultra vires*. Before confederation Tuscarora was not a part of the county for municipal purposes, and the Province had no title to an Indian Reserve: B. N. A. Act, s. 91, class 24, s. 109; Dominion Sessional Papers, 1877, No. 89, p. 2; *Church v. Fenton*, 28 C. P. 384, at pp. 398, 400, 4 A. R. 159; *Regina v. St. Catharines Milling Co.*, 10 O. R. pp. 224, 230.

Irving, Q.C., for the Attorney-General of Ontario. Although Tuscarora is not able to organize itself into a municipality by reason of its being an Indian Reserve, yet it was and is part of Brant, and municipally under the jurisdiction of the County Council, as for example, in the matter of roads and bridges. See *Regina v. Shavelear*, 11 O. R. 727; Canada Temperance Act, R. S. C. c. 106, secs. 2, 13.

Marsh. If the reference to municipal purposes in R. S. O. c. 5, s. 1, is to be interpreted as referring to an organizing of the township as a municipality when it becomes possible to do so, *i. e.*, by the Indians becoming enfranchised, we do not contest its validity.

[BOYD, C. It is a reasonable construction to give the statute, and it is not necessary to hear Mr. Irving further. I agree with his argument as to Tuscarora being part of the county for certain purposes.]

Marsh. Then as to our mode of proceeding here, the returning officer has been advised by the Minister of Justice to receive the Indian votes, and intends to do so, and therefore it is our proper course to move for a prohibition, instead of allowing the votes to be received and then pursuing any remedy there might be against the returning officer. Under the Canada Temperance Act itself there is no remedy. A question of this kind could not be considered on a recount under that Act: *Re Canada*

Temperance Act v. City of St Thomas, 9 O. R. 154, 12 A. R. Argument.

677. Section 12 of that Act defines who may vote for the adoption of the Act, and 51 Vic. c. 35, s. 3 (D.) shows that the same persons are to be entitled to vote for its repeal. The chief difficulty is as to the construction of section 12. "Township" in sec. 2 (b) must mean "Township for municipal purposes" which Tuscarora is not now. Then again sec. 34, sub-s. 2, of the Canada Temperance Act, shows that the oath to be administered to a voter is the same as that to be taken by a voter at a Provincial election, and by sec. 42, no man refusing the oath can vote, and certainly no Tuscarora Indian could take the oath prescribed by R. S. O. 1887, vol. 1, p. 168. Then the provisions of the Indian Act, R. S. C. c. 43, are inconsistent with those of the Canada Temperance Act, in many respects, as well as to the introduction of intoxicating liquor upon reserves. They are much more stringent. The Indians are under the Indian Act, not under the Canada Temperance Act, and have nothing to do with the adoption or repeal of the latter.

Masten, for the returning officer, expressed his readiness to abide by any order that the Court might make.

BOYD, C. :—

The arguments are insuperable, and prohibition must go. The special Act governing the Indians was more stringent than any law governing the white population, and the Canada Temperance Act can have no operation where the Indian Act is in force. The Indians are supposed, and properly supposed, not to be able to govern themselves as to the use of "fire-water," as they call it, and therefore the Legislature has wisely placed a stringent law upon the Statute book. The township of Tuscarora is under that law, and the Indians dwelling there have nothing to do with the Canada Temperance Act. It is a violation of the first principles of justice to say that

Judgment. Indians should be allowed to vote upon the repeal of the Act. It would be another phase of the wrong done in the taxation of the Colonies. I accede to Mr. Marsh's argument as to the 12th sec. of R. S. C., ch. 106. It is to be read, not as referring to Indians, but to white men, and "county" and "township" [sec. 2 (b)] must be read as meaning for municipal purposes so far as they are legal and necessary. Prohibition should go, and I do not think I should give costs.

Boyd, C.

The learned Chancellor further remarked that no question had been raised as to prohibition being the proper form of remedy in the case, and that, therefore, he would assume for the purposes of this judgment that it was a proper mode.

Afterwards, also, on settling the order, he pointed out that his judgment was directed only against the Indians, and not against white residents of the township of Tuscarora, who might be electors.

A. H. F. L.

[CHANCERY DIVISION.]

HORTON V. THE PROVINCIAL PROVIDENT INSTITUTION.

*Insurance, life—Provident institutions—Default in payment of dues—
Forfeiture clauses in policies—Waiver—Estoppel.*

The plaintiff's husband was the holder of two certificates of the defendants, a provident institution, whereby, on his paying \$1.50 and \$2.50 respectively semi-annually on May 15th and November 15th, together with assessments, and conforming to the conditions thereof, the defendants promised to pay the plaintiff a certain amount on his death. Among the conditions were, that thirty days default in payment would suspend him from membership and void the certificates, and that he should then be re-instated on furnishing satisfactory proof of good health within ninety days from such suspension, and paying arrears, and in the meanwhile the certificates should be void, and of no effect. Plaintiff's husband was in his ordinary good health on August 27th, 1886, but died on September 2nd, 1886, having paid all dues and assessments regularly up to May 15th, 1886. It appeared that on August 14th, the plaintiff's husband received a letter from the defendants' secretary requesting payment of the dues due on May 15th, 1886, and of a certain assessment, and the same day remitted the money, and on August 21st, 1886, the defendants sent written receipts therefor, marked across their faces: "Conditional that you are in good health;" and also wrote demanding payment of a certain other assessment as due from the plaintiff's husband as a member, which communication, however, never reached him. On August 23rd, 1886, the plaintiff wrote to the defendants offering to pay the assessment, and on the same day the defendants replied that they had received the money, and forwarded the receipts to the plaintiff's husband, and added that they trusted that this would be satisfactory. The plaintiff's husband was retained on the defendants' books as a member all the while, and the certificates were never cancelled. It also appeared that it had not been the general practice of the defendants to hold members to the strict terms of the payments. The plaintiff now brought this action against the defendants to recover upon the certificates.

Held, affirming the decision of ROBERTSON, J., that the plaintiff was entitled to judgment, for the evidence shewed that there was no intention, up to her husband's death, and for sometime thereafter, to take advantage of his default in payment, and the receipt of the money in August by the defendants, and their crediting him on the books therewith, clearly revived the certificate, and the defendants could not be allowed to fall back on the default in order to destroy the plaintiff's right.

Per BOYD, C.—Upon the record supplied by the books and practice of the corporation, the deceased never ceased to be a member.

THIS was a motion of the defendants by way of appeal from the judgment of ROBERTSON, J., reported 16 O. R. 382, where the facts are fully stated.

The motion came on for argument on December 19th, 1888, before BOYD, C. and FERGUSON, J.

Argument.

Attorney-General Mowat and J. S. Robertson, for the motion.

W. R. Meredith, Q. C., contra.

March 18th, 1889. BOYD, C.:—

Having regard to the proceedings and the conduct of the corporation in getting payment of the dues and in sending notice of assessment of August 21st, I think the judgment is right, and that there should be no amendment so as to raise any larger issues, as to concealment of material facts, referable to the reinstating of the deceased as a member. The corporation does not appear to have adopted the mode of treating defaulting members as withdrawn or suspended *ipso facto*. They called upon the deceased to pay by the circular without imposing any conditions—they accept that payment and enter it on their books without any proviso that it was a conditional payment; so that upon the record supplied by the books and practice of the corporation, the deceased never ceased to be a member. The receipt forwarded “conditional on his being in good health” never reached the deceased, and he was not otherwise notified that the corporation required proof of his health. But as a matter of fact, the plaintiff proved the state of health of the deceased at the time the receipt was given, and the judgment finds that his health then satisfied the condition imposed by the corporation.

Affirm the judgment with costs.

FERGUSON, J.:—

The material facts of the case are very fully and clearly stated in the judgment of the learned Judge before whom the trial took place, which is reported in 16 O. R., at page 382. The findings of fact twelve in number are also stated at length. These findings are, I think, fully supported by the evidence, and after

a perusal of the whole case, and the authorities referred Judgment. to on the argument, I am of the opinion that the proper FERGUSON, J. conclusion was arrived at. I therefore agree that judgment should be affirmed.

A. H. F. L.

This case has been carried to the Court of Appeal.—REP.

[CHANCERY DIVISION.]

THE HOBBS HARDWARE COMPANY V. KITCHEN.

Bills of sale and chattel mortgages—Partnership—Mortgage to one partner for firm debt—Affidavit of bond fides.

Where an arrangement had been entered into between the partners of a firm whereby, although moneys were to be advanced by the firm, the securities therefor were to be taken in the individual name of each partner according as each was willing to accept the security of the person seeking to borrow.

Held that a chattel mortgage so taken was valid as against creditors, and that the mortgagees could properly make the affidavit of *bond fides*.

Semble, there is no legal objection to a loan being made by one member from the moneys of a firm, and the taking as a security therefor a chattel mortgage to himself.

THIS was an interpleader issue in which "The Hobbs Hardware Co.," and several other execution creditors of one J. B. Stewart were plaintiffs, and John Burwell Kitchen was defendant.

The defendant claimed as a chattel mortgagee.

The issue was tried at Chatham on March 6th, 1889, before BOYD, C.

The evidence shewed a *bond fide* advance upon the security of a chattel mortgage of the money of the firm of Kitchen Bros., but the mortgage was taken to John Burwell Kitchen, one of the members of the firm, upon an understanding between him and his brother, A. B. Kitchen, the other partner, that certain securities were to be taken to

Statement. the individual partner as each was willing to accept the security offered.

Gibbons, for the execution creditor. The debt was due to the firm, and the mortgage should have been made to the firm. If the mortgagee was a trustee for the firm the trust should have been shewn: *Bank of Hamilton v. Tambllyn*, 16 O. R. at p. 249; *Brodie v. Ruttan*, 16 U. C. R. at p. 210. There was no prior debt due to the mortgagee, and even if the mortgage was made to the firm, it would not be sufficient for one member to make the affidavit of *bond fides*.

Hoyles, for the chattel mortgagee. The transaction was with the firm in one sense, but it had been arranged that no mortgages should be drawn to the firm, but to the individual partner who was willing to take it in the case of a dissolution. This debt was thus assigned to the partner to whom the mortgage was made. Trust and agency cases are different from this case. There was no intention that the mortgagee was to be a trustee for the firm, or hold the mortgage for anyone but himself. He was willing to be responsible: *White v. Brown*, 12 U. C. R. 477; *McLeod v. Fortune*, 19 U. C. R. 100; Barron on Bills of Sale, 2nd ed. 337; *Tidey v. Craib*, 4 O. R. at p. 702.

Gibbons, in reply. The evidence shews that the mortgage was a firm security, and that the mortgagee had no such individual interest as would enable him to hold it against the firm.

March 26, 1889. BOYD, C.:—

The single point for determination is whether a mortgage to one partner for an advance out of firm moneys is invalid, as against the creditors of the mortgagor.

It is urged that the statute as to chattel mortgages has not been complied with, because the transaction was with the firm, and both members of it should have been specified as mortgagees.

Both parties agree that there is no authority governing the question thus raised. Judgment.
Boyd, C.

It is admitted by the attacking creditors, that there is no fraud or *mala fides* in the transaction; that there was a real advance, and that formally and in other respects the security is unimpeachable.

The instrument being valid on its face, extrinsic evidence was given to raise this point now relied on. But further evidence was given by the mortgagee, to shew an arrangement between him and his co-partner, by which for some two years they have taken securities in the individual name of each partner, according as each partner was willing to accept the security of the person seeking to borrow.

Many of such securities were proved at the trial; partnership property in reality, but in form pertaining to the individual member of the firm named as mortgagee.

There is nothing illegal or misleading to the public in such an arrangement; the mortgagor has nothing to say to it, and why creditors should be allowed to take advantage of it to the detriment of an honest lender, I fail to see. As between the partners, the one agrees to allow the other to use the moneys of the firm for the purposes of the security: and in this particular case, while the mortgage was taken in the name of one partner, the other was the subscribing witness to the signature of the mortgagor, thus giving very emphatic approval to the transaction.

It seems to me, that this arrangement enabled the mortgagee to make the affidavit that the mortgagor was justly and truly indebted to him, as distinguished from the firm. But apart from this, as joint owners in law of the assets of the firm, I see no *legal* objection to a loan by one member from the moneys of the firm, and the taking of the mortgage to himself. In equity of course the security is the property of the partnership, and the individual mortgagee would have to account for the moneys advanced.

In every aspect this claim does not appear to me well-founded in law, and it is certainly not otherwise meritori-

Judgment.
Boyd, C.

ous. I feel no disposition so to read the statute as to destroy the security, and I therefore give judgment for the claimant, and if costs are in my disposal, with costs.

G. A. B.

[QUEEN'S BENCH DIVISION.]

TRUAX ET AL. V. DIXON ET AL.

Lien—Mechanics' lien—Material men—Extent of lien—Cross-claim by owner against contractor—Set-off—Payment—Registered claim of lien, requirements of—R. S. O. ch. 126, secs. 9, 10, 16, and schedule—Affidavit—Commissioner.

The last of the materials in respect of which the plaintiffs, as sub-contractors, claimed a lien under the Mechanics' Lien Act upon the estate of the land-owner, were delivered on the 16th September, 1887, and the claim of lien was not registered nor was notice in writing given until the 11th October, 1887, and this action to enforce the lien was not brought till 29th October, 1887.

Held, that under secs. 9 and 10 of R. S. O. ch. 126, the lien claimed did not attach so as to make the owner liable to a greater sum than the sum payable by the owner to the contractor.

Goddard v. Coulson, 10 A. R. 1, followed.

The owner had an old account against the contractor for bread supplied, which account, with interest, he charged against the sums due to the contractor under the contract.

Held, upon the evidence, that the account and interest should be treated, not as a matter of set-off, but as a payment of so much of the contract price.

Sec. 16 of R. S. O. ch. 126 requires that the claim of lien shall state the time or period within which the materials were furnished. The claim registered in this case did not state the year, but only the months and days of the months. It stated, however, that the materials were furnished on or before the 17th September, 1887; and in this and all respects it followed Form 1 in the schedule to the Act; and sub-sec. 2 of sec. 16 provides that the claim may be in one of the forms given in the schedule to the Act.

Held, that the statement that the materials were furnished on or before a named day was a sufficient statement of the time or period within which they were furnished, according to the true intent and meaning of sec. 16.

Roberts v. McDonald, 15 O. R. 80, overruled.

The question of the authority of schedules to Acts of Parliament discussed.

The land upon which the lien was claimed was in the county of Wellington, but the affidavit of the plaintiffs verifying the claim of lien registered was made in the county of Bruce, and before a commissioner for taking affidavits in that county.

Held, that the affidavit satisfied sec. 16, sub-sec. 2, of the Act.

This was an action to enforce a mechanic's lien. The statement of claim alleged among other things that:—The

plaintiffs were manufacturers of sash doors living and carrying on business at the town of Walkerton, in the county of Bruce; the defendant W. J. Dixon was a contractor and builder living in the town of Mount Forest, in the county of Wellington; and the defendant George Dickson was the owner of the land, situate in Mount Forest, in respect of which the plaintiffs claimed the lien. The defendant W. J. Dixon was employed by the defendant George Dickson to do work and furnish materials for the erection of certain stores upon the land in question, and W. J. Dixon employed the plaintiffs to do part of the work and furnish part of the materials, which they did, as they alleged, to the value of \$254.29, and completed the work and the delivery of the materials on the 17th September, 1887.

On the 11th October, 1887, the plaintiffs filed in the registry office for North Wellington a statement of their claim of lien, as follows:

"We, Reuben Truax and Philip Truax, both of the town of Walkerton, in the county of Bruce, manufacturers, trading together under the name, style, and firm of R. Truax & Co., under the Mechanics' Lien Act, claim a lien upon the estate of George Dickson, of the town of Mount Forest, in the county of Wellington, in the undermentioned lands, in respect of the following materials, that is to say:" (Then followed an account of the materials supplied, with prices and the months and days of the months on which supplied, but without mention of any year, the prices amounting to \$245.29) "which materials were furnished for the said W. J. Dixon, of the town of Mount Forest aforesaid, contractor, on or before the 17th day of September, 1887. The sum claimed as due and to become due is \$245.29. The following is a description of the lands to be charged. . . . The said materials were furnished on credit, and the period of credit agreed to will expire on the 17th day of October, 1887."

The action was tried before ROBERTSON, J., at Walkerton, in the spring of 1888.

Statement.

The following facts appeared in evidence:

The defendant George Dickson entered into an agreement with the defendant W. J. Dixon on the 14th February, 1887, by which the defendant W. J. Dixon agreed to furnish all the materials and labour necessary to finish and complete the carpenter work of a block of stone and brick stores to be erected by the defendant George Dickson, on lot number sixteen, west of Main street, in the town of Mount Forest, for the sum of \$1,499, and to finish and complete the said work in every particular on or before the 20th September, 1887, and in case of failure to complete the work at that date, that he should pay damages to be assessed in a sum equal to \$10 for each and every day the work was delayed beyond that time; and it was thereby provided that if the defendant George Dickson should at any time desire any changes in either the quantity or quality of the work, they should be attended to and executed by the defendant W. J. Dixon without in any way violating or vitiating the said contract; but the value of all such changes was required to be agreed upon and indorsed upon the said contract, or no allowance should be made for them by either party; and the defendant George Dickson thereby agreed to pay to the defendant W. J. Dixon the sum of \$1,499, by estimates from the superintendent in writing, at the rate of seventy-five per cent. as the work progressed, and the balance of contract price and extras, if any, twenty-eight days after the whole work was completed, and final certificate issued by the superintendent to that effect in writing. Extra work was done by the defendant W. J. Dixon, and the agreed value of such extra work was \$155, and was indorsed on the said contract. Evidence was given of other extra work having been done, but no account of it was ever furnished by the defendant W. J. Dixon, nor was the value of it agreed upon or indorsed upon the said contract.

On the 27th September, 1887, the superintendent certified that the defendant W. J. Dixon had completed his contract, and that the final estimate and extras would be

payable on the 26th October, 1887. It appeared that the defendant George Dickson had up to and including the 1st October, 1887, paid to the defendant W. J. Dixon the whole contract price of \$1,499, and the \$155 for extras, except the sum of \$63.79, which he claimed was the only sum in respect of which the plaintiffs were entitled to a lien, if entitled at all, and which sum was arrived at by crediting the defendant W. J. Dixon with the following sums, viz.:

Contract price	\$1499 00
Extras	155 00
Old account, 1886	81 57
“ 1887	90 31
	<hr/>
	\$1825 88
And deducting therefrom the sum of	1762 09
	<hr/>
	\$63 79

The deduction of \$1,762.09 being made up of money paid to the defendant W. J. Dixon, and on his order, and of an account and interest which the defendant George Dickson had against the defendant W. J. Dixon, as to which account and interest the defendant George Dickson gave the following evidence: “Q. You had a bread account against the contractor? A. Against his men and him. Q. What arrangement was there between him and you? A. Before he got the contract at all he owed me a good large bill. I never could get any settlement with him for years before this, and it was on this ground that I gave him the contract, because he was \$43 more than another party that would have finished the job without any of this trouble at all. Q. Was there any understanding between you about this bill? A. Certainly. The first tender that he put in, the understanding was that if I gave him the contract I was to get my account out of the contract. By his Lordship.—Q. What was the account; how much was this account? A. \$262.25 up till the building was completed. Q. No. What was the amount of the old account that you said was understood should be deducted from the contract price? A. Somewhere about \$209. Q. That is before the contract was entered into? A. Yes.”

Statement.

By defendant George Dickson's counsel.—“Q. How was it made up from \$200 to \$262—things that he got as the work was going on? A. Yes. Q. Was there any agreement about those? A. Yes. Q. What was that? A. They were to be put with his other account and settled for. Q. And the agreement was that these were to go in with the rest, and to be paid for out of the building? A. Yes.”

By plaintiffs' counsel.—“Q. You charged \$19.62 of interest on your old account? Yes. Q. There was nothing said as between you and him about interest? A. Yes. Q. There was, eh? A. Yes. Q. There was no talk between you and him that he was to pay any interest? A. Up to the time I got this contract he always told me that he would pay me interest on this account. Q. If you charge interest you ought to credit him with interest. Was there anything said between you and him that he was to be allowed interest? A. Yes. Q. There was? A. I suppose it would be just as well one way as the other?”

It appeared that the defendant W. J. Dixon absconded shortly after the 1st October, 1887.

The plaintiffs proved that they delivered to the defendant W. J. Dixon, between the 8th day of August and the 16th day of September, 1887, both days inclusive, materials to the value of \$284.54; that on the 11th October, 1887, they filed in the registry office of the registry division in which the land of the defendant George Dickson, above mentioned, was situated, the claim of lien set out in the statement of claim, verified by their affidavit, sworn before a commissioner for taking affidavits in the county of Bruce, at Walkerton, in the county of Bruce; that, of the sum of \$245.29, for which they claimed a lien, materials of the value of \$227.89 went into the buildings of the defendant George Dickson, and that on the 10th October, 1887, the plaintiffs' solicitors wrote and sent the following letter to the defendant George Dickson:—“We have to-day filed on behalf of R. Truax & Co., of Walkerton, a lien under the Mechanics' Lien Act against lot

16, West Main street, Mount Forest, for \$245.29, the value ^{Statement} of certain materials supplied by R. Truax & Co. to W. J. Dixon, and used in the construction of a certain building, erected by Mr. W. J. Dixon for you on said lot. Unless this amount and our costs herein is paid to us within a month we will take proceedings to enforce the said lien."

On the 29th October, 1887, the writ commencing this action was issued, and on the 2nd November, 1887, a certificate of *lis pendens* was registered.

The learned Judge on the 12th July, 1888, gave judgment for the plaintiffs against the defendant W. J. Dixon for \$257.51, which included interest up to that date, with full costs of suit, and he found and declared that the plaintiffs were entitled to a lien on the lands of the defendant George Dickson in the pleadings mentioned in respect of the said sum of \$257.51, to the sum of \$165.40, together with interest to that date, \$8.25; in all to \$173.65.

On the 23rd November, 1888, *W. H. Kingston*, for the defendant George Dickson, moved before the Divisional Court (ARMOUR, C. J., FALCONBRIDGE and STREET, JJ.) to set aside the said judgment in so far as it declared the plaintiffs entitled to a lien on the land of the defendant George Dickson, and to dismiss the action with costs as against him on the ground that the said judgment was wrong, for the reasons: (1) That under the Mechanics' Lien Act no action would lie to enforce a sub-contractor's lien. (2) That the plaintiffs' registered lien was not sufficient in form under the said Act to give the plaintiffs a lien thereunder, in the following respects: (a) That it did not state within the meaning of the statute the name and residence of the owner of the property to be charged. (b) That it did not state within the meaning of the statute the name and residence of the person for whom or upon whose credit the work was done and the material provided. (c) That it did not state the time or period within which the same was or was to be done or furnished. (d) Because the affidavit of verification filed therewith, as required by the

Argument. Act, was sworn before a commissioner for the county of Bruce, and not before a commissioner for the county of Wellington, being the county in which the land lay, as required by the Act.

H. P. O'Connor, for the plaintiffs, shewed cause.

March 7, 1889. The judgment of the Court was delivered by

ARMOUR, C. J.:—

It seems clear from the evidence that the amount which the plaintiffs were entitled to recover against the defendant W. J. Dixon was the sum of \$284.54 exclusive of any interest, and the judgment should be amended in this respect if the plaintiffs so desire.

The last of the materials in respect of which the lien was claimed were delivered on the 16th September, 1887, and the claim of lien was not registered nor was notice in writing given until the 11th October, 1887, and this action was not brought till the 29th October, 1887; consequently the lien claimed did not attach so as to make the owner liable to a greater sum than the sum payable by the owner to the contractor: *Mechanics' Lien Act*, R. S. O. ch. 126, secs. 9 and 10; *Goddard v. Coulson*, 10 A. R. 1.

The last money paid by the defendant George Dickson to the defendant W. J. Dixon was on the 1st October, 1887, and the balance then payable by the defendant George Dickson to the defendant W. J. Dixon was, therefore, the only sum in respect of which the lien claimed could attach.

This balance was, according to the evidence, the sum of \$63.79, or such other sum as would be arrived at by crediting the defendant W. J. Dixon with the interest properly allowable on his accounts against the defendant George Dickson of \$81.57 and \$90.31 respectively, as against the interest properly allowable on the account of the defend-

ant George Dickson against the defendant W. J. Dixon of about \$209.

Judgment.

ARMOUR,
C.J.

The account and interest which the defendant George Dickson charged against the defendant W. J. Dixon must be treated upon the evidence not as a matter of set-off, but as at least a payment of so much of the contract price : *Smith v. Winter*, 12 C. B. 487; *Ching v. Jeffery*, 12 A. R. 432.

This action not having been commenced until long after the expiration of thirty days from the date of the delivery of the last materials furnished by the plaintiffs to the defendant W. J. Dixon, the lien claimed must depend altogether upon the due registration of the claim of lien.

Section 16 of the Mechanics' Lien Act requires that the claim of lien shall state "The name and residence of the claimant and of the owner of the property to be charged, and of the person for whom and upon whose credit the work is done or materials or machinery furnished, and the time or period within which the same was, or was to be, done or furnished."

The claim of lien registered in this case did not state the year in which the materials were furnished by the plaintiffs to the defendant W. J. Dixon, although it stated the months and days of the months in and upon which the materials were furnished, and it merely stated that the materials were furnished on or before the 17th day of September, 1887.

But sub-section 2 of section 16 provides that "The claim may be in one of the forms given in the schedule in this Act;" and form 1 given in the schedule is as follows : "A. B. (name of claimant), of (here state residence of claimant), under the Mechanics' Lien Act claims a lien upon the estate of (here state the name and residence of owner of the land upon which the lien is claimed), in the undermentioned land in respect of the following work (or materials), that is to say (here give a short description of the nature of the work done or materials furnished and for which the lien is claimed), which work was (or is to be) done (or

Judgment.

ARMOUR,
C.J.

materials were furnished) for (here state the name and residence of the person upon whose credit the work is done or materials furnished), on or before the day of .” And the claim of lien registered complied with this form. The question is, therefore, was the statement in the claim of lien registered, that the materials were furnished on or before the 17th day of September, 1887, which is in accordance with the form given by the Act, a sufficient compliance with the Act, which requires that the claim of lien shall state the time or period within which the same were furnished, and provides that the claim may be in the form given by the Act? It seems to me that the question thus put carries with it its own answer, and that it was manifestly the intention of the Legislature that the statement that the materials were furnished on or before a named day should be a sufficient statement of the time or period within which the same were furnished.

In *Regina v. Epsom*, 4 E. & B. 1003, Lord Campbell, C. J., said: “The schedule was very properly brought to our notice: but the schedule is not an enactment, and could be used only in the case to which it was applicable. My unfortunate experience in practical legislation has taught me that enactments, in passing through Parliament, are often altered, while a schedule is allowed to remain without any corresponding alteration.”

In *The Attorney-General v. Lamplough*, 3 Ex. D. 214, Brett, L. J., said at p. 229: “We come to the remaining part of the schedule. With respect to calling it a schedule, a schedule in an Act of Parliament is a mere question of drafting—a mere question of words. The schedule is as much a part of the statute, and is as much an enactment as any other part.”

Whatever may be said of schedules to different Acts of Parliament, the forms given in the schedule to this Act and referred to in sub-section 2 of section 16, are as much part of that enactment as if they were set out therein instead of, as they are, in the schedule.

Whether forms given in the schedule to an Act of

Parliament or in the Act itself "are made to suit rather the generality of cases than all cases:" *Regina v. Baines*, 12 A. & E. 210; "are inserted merely as examples, and are only to be followed implicitly, so far as the circumstances of each case may admit:" *Bartlett v. Gibbs*, 5 M. & G. 81; *Hennah v. Whyman*, 2 C. M. & R. 239; whether they must be followed as in *Davison v. Gill*, 1 East 64, and *Regina v. Pinder*, 24 L.J. Q. B. 148; and whether they may or may not be followed, and if followed, may be safely followed, as in *In re Allison*, 10 Ex. 561; *Regina v. Hyde*, 21 L. J. M. C. 94; *Regina v. Davis*, 18 U. C. R. 180; *In re Wilson*, 23 U. C. R. 301; *Regina v. Shaw*, 23 U. C. R. 616; *Reid v. McWhinnie*, 27 U. C. R. 289; *Regina v. Lake*, 7 P. R. 215; *Gemmell v. Garland*, 12 O. R. 139; *Earl of Mountcashell v. Viscount O'Neill*, 5 H. L. C. 937; *Regina v. Russell*, 13 Q. B. 237; *Allen v. Flicker*, 10 A. & E. 640; *Boyle v. Ward*, 11 U. C. R. 416; *Quackenbush v. Snider*, 13 C. P. 196, must always be a question of the proper construction to be placed upon the Act of Parliament.

Judgment.

ARMOUR,
C.J.

The Interpretation Act, R. S. O. ch. 1, sec. 8, sub-sec 35, seems to imply that prescribed forms may be safely followed, for it provides that "Where forms are prescribed, slight deviations therefrom not affecting the substance or calculated to mislead, shall not vitiate them."

We must construe section 16 of the Act and its sub-sections as if the forms in the schedule were contained in the enacting clause, sub-section 2; and so construing them and putting their proper interpretation upon them, we must hold that the statement in the form that the materials were furnished on or before a certain day is a sufficient statement of the time or period within which the same were furnished according to the true intent and meaning of the section.

In *Roberts v. McDonald*, 15 O. R. 80, my brother Proudfoot held a claim of lien which followed this form in stating that the work was done and the materials were furnished on or before a certain day defective; but in this,

Judgment. having regard to the authorities above cited, we cannot
ARMOUR, agree.
C.J.

We are of opinion that the claim of lien registered was also sufficient as against the other objections taken to it, and that the affidavit of the claimants required by subsection 2 of section 16 was properly made in the county of Bruce, and before a commissioner for taking affidavits in that county.

The exact amount payable by the defendant George Dickson to the defendant W. J. Dixon, and in respect of which the lien exists, can be readily computed from what we have said; but, as such sum will be under \$100, the costs must be governed accordingly.

[QUEEN'S BENCH DIVISION.]

LEWIS V. BRADY.

Assessment and taxes—Distress for taxes—Legal assessment—Delivery of roll to collector—Return of roll by collector—Appointment of collector—Declaration of office—Demand of taxes—R. S. O. ch. 193, secs. 12, 120, 132, 133.

The defendant, as collector of taxes of a village for the year 1886, on the 9th January, 1888, seized goods of the plaintiff as a distress for taxes assessed against the plaintiff upon the assessment roll for 1886. The plaintiff brought this action of replevin to recover the goods so seized.

(1.) *Held*, upon the evidence, that it was not shewn that the plaintiff was not duly and legally assessed for the taxes in respect of which the distress was made.

(2.) Sec. 120 of the Assessment Act, R. S. O. ch. 193, provides that the clerk shall deliver the roll to the collector on or before the 1st day of October, or such other day as may be prescribed by a by-law of the local municipality; but no by-law was passed, and the roll for 1886 was not delivered by the clerk to the defendant until about the 1st January, 1887.

Held, that the provisions of sec. 120 are directory, and not imperative; and the omission to deliver the roll within the prescribed time had not the effect of preventing the collector from proceeding to collect the taxes mentioned in the roll as soon as it was delivered to him, or of rendering such proceedings invalid.

(3.) Sec. 132 of the Act provides that every collector shall return his roll to the treasurer on or before 14th December in each year, or such day in the next year, not later than 1st February, as the council may appoint; and sec. 133 provides that in case the collector fails to collect the taxes by the day appointed, the council may by resolution authorize the collector, or some other person in his stead, to continue the levy and collection. On 11th December, 1886, (before the roll was delivered to the collector) the council passed a resolution that the collector proceed at once to collect the taxes for 1886; on 7th March, 1887, another resolution instructing P. B. (the defendant), to enforce the payment of the uncollected taxes at once; on 14th November, 1887, a resolution that P. B., collector, be instructed to have the roll for 1886 returned by the 24th inst.; and on 17th January, 1888, (after the distress and before the replevy) a resolution that the time for the collection of the unpaid taxes for 1886 be extended until 15th February, 1888, and that P. B. be authorized to collect until that date. The roll for 1886 remained in the hands of the defendant from the time of the delivery of it to him until after the distress and replevy.

Held, that the defendant was either the collector within the meaning of sec. 132 when he made the distress, and having the roll still in his hands unreturned was authorized to make it, following *Newberry v. Stephens*, 16 U. C. R. 65; or he was a person authorized as collector, or in the stead of the collector, by the resolutions of the council to continue the levy and collection under sec. 133, which provides no limit of time in such case; and in either case the distress by him was valid.

(4.) By by-law providing for the assessment and levying of rates for 1885, passed by the council on 11th December, 1886, the defendant was appointed collector to collect the rates for 1885. On the 23rd December, 1886, the defendant entered into a bond with sureties as collector to the corporation of the village, which recited that he had been appointed

collector ; and on the same day a resolution was passed by the council that the bonds of P. B. as collector be accepted, as presented to the council ; but no other appointment of the defendant as collector was proved, and the defendant swore that he did not think he made any declaration of office for any year.

Held, that the effect of the defendant not having made and subscribed the declaration required by sec. 271 of the Municipal Act, R. S. O. ch. 184, was not to make his acts void ; and having been duly appointed by by-law collector, he held office until removed by the council, even if what was done by the council on the 23rd December, 1886, did not constitute a good appointment.

(5.) *Held*, also that the appointment in December, 1887, of another person to collect the rates for 1887 had not the effect of removing the defendant from office ; for it was an appointment to collect the rates for that year only, and by sec. 12 of the Assessment Act the council might appoint such number of collectors as they might think necessary ; but even if it had that effect, the roll for 1886 had not been returned by the defendant, and the resolution of the 17th January, 1888, authorized him to continue the collection under sec. 133, and legalized the distress then made.

(6.) It was proved that the defendant on the 11th January, 1887, duly demanded the taxes distrained for.

Held, that this demand was sufficient to warrant the distress, and the fact that the defendant several times afterwards demanded the same taxes did not affect the validity of the first demand, which was the only one required.

Statement.

THIS was an action of replevin tried before FERGUSON, J., at Sandwich.

R. M. Meredith, for the plaintiff.

W. Cassels, Q.C., and *A. S. Clarke*, for the defendant.

The facts are set out fully in the judgment of FERGUSON, J.

January 4, 1889. FERGUSON, J. :—

THE action is replevin for taking the plaintiff's goods, one billiard table and one pool table, in a hotel kept by the plaintiff in the village of Essex Centre, in the county of Essex, and unjustly detaining the same, &c., and for damages by reason of the plaintiff being deprived of the use of the property, and consequent injury to his business.

The defendant makes avowry by stating that the plaintiff was a resident within the corporation of Essex Centre and liable to assessment for municipal taxes pursuant to the statute in that behalf, and was duly assessed for such

taxes for the year 1886 under the provisions of such Judgment. statute, the amount thereof being, to wit, the sum of FERGUSON, J. \$82.57, which sum the plaintiff became liable to pay pursuant to the said statute.

2. That the defendant was duly appointed by the municipal council for the said village collector of the said municipal taxes, and received from the clerk of the said municipality the collector's roll as provided by the said statute.

3. That the plaintiff's name was set down in such roll as assessed for and liable to pay the said sum of \$82.57 as such municipal taxes for the said year 1886.

4. That pursuant to the provisions of the said statute, and whilst the said roll was lawfully in the defendant's possession as such collector, and whilst the defendant had lawful authority to demand and collect said taxes, the defendant called at least once on the plaintiff, and demanded payment of the said taxes so payable to him.

5. That the plaintiff neglected to pay his said taxes for more than fourteen days after such demand.

6. That thereafter and pursuant to the authority of said statute, and whilst the said roll was lawfully in the defendant's possession as such collector, and whilst the defendant had lawful authority to demand and collect the said taxes, the defendant for the purpose of levying the said taxes *well avows* the taking of the said goods, being goods of the plaintiff and in his possession and in his hotel called the "Grand Central Hotel," within the said municipality, as for and in the name of a *distress* for the said taxes so due and payable by the plaintiff as aforesaid.

7. That whilst the said roll was lawfully in the defendant's possession as said collector, and whilst the taxes so due and payable by the plaintiff as aforesaid remained unpaid and on, to wit, the 7th day of March, 1887, the municipal council of the said village by resolution authorized the defendant to continue the levy and collection of the said taxes in the manner and with the powers provided by law for the general levy and collection of taxes, which

Judgment. resolution was in full force at the time of the said levy
FERGUSON, J. and distress of the plaintiff's said goods.

8. And that on, to wit, the 17th day of January, 1888, the said municipal council extended the time for the collection of the said unpaid taxes for 1886 until the 15th day of February, 1888, (being a day subsequent to the said levy and distress) and authorized the defendant to collect said taxes till that date.

The distress took place on the 9th January, 1888.

To this avowry the plaintiff pleads nine pleas.

1. That the plaintiff was not duly assessed for taxes within the municipal corporation of the village of Essex Centre for the year 1886, nor did he become liable to pay the amount of \$82.57 for such taxes, as in the avowry alleged.

2. That the defendant was not duly appointed collector of taxes for the said municipality for the said year, as in the avowry alleged.

3. That the plaintiff's name was not set down and did not duly appear in the alleged collector's roll of the said municipality as assessed for and liable to pay the said sum of \$82.57 for municipal taxes for the said year 1886, as in the avowry alleged.

4. That the collector's roll was not made and delivered to the defendant pursuant to the statute in that behalf, and the said roll was not at the time of the alleged demand or distress in the hands of the defendant as collector of taxes for the said municipality, as in the avowry alleged.

5. That the defendant did not demand payment of the said alleged taxes in manner required by the statute in that behalf before making the alleged distress.

6. The municipal council of the said corporation did not on the 7th day of March, 1887, authorize the defendant to continue the collection of the said taxes, nor was such alleged authority in force at the time of the alleged distress.

7. That the said corporation did not on the 17th day of

January, 1888, extend the time for collection of the said Judgment. alleged taxes, nor authorize the defendant to collect the FERGUSON, J. same until the 15th day of February, as alleged.

8. That at the time of the alleged distress the municipality had no power or authority to cause the goods of the plaintiff to be distrained for said taxes of the year 1886.

9. That at the time of the alleged distress the defendant had no power or authority to levy by distress the goods of the plaintiff for the said taxes of the year 1886.

Upon these pleas of the plaintiff the defendant joins issue.

There is no doubt that the plaintiff was resident in the village of Essex Centre, and liable to be assessed there for the year 1886. The defendant put in and proved the last revised assessment roll for the village for the year 1886. On this the plaintiff's name appears, and, so far as I can see, he appears to be regularly assessed for and upon the roll for the sum of \$4,200. A certified extract is left as an exhibit. He, the defendant, puts in and proves in the same way the collector's roll for the same year, and on this the plaintiff's name also is. This appears to be regular and proper, so far as I am able to perceive, the plaintiff appearing to have been assessed in the same way as on the assessor's roll and for the same sum; the rate being carried out as a total of \$82.57. No specific objections were made to these rolls, or either of them, by counsel for the plaintiff.

The defendant puts in without objection a certified copy of a by-law of the municipality, No. 68, entitled, "*A by-law to assess and levy rates for county, school, and other purposes, for the year 1886.*" This enacts that the following sums shall be levied and collected upon and from all the ratable property of the village of Essex Centre for the year 1886. Then follow \$270.06 for the general purposes of the county of Essex for 1886; \$1,575.10 for public school purposes for the year 1886; \$800 for high school purposes for the same year; \$1,676 for general village purposes of this municipality for the same year; \$944.90 for the purpose of paying certain sums of money in accordance

Judgment. with the award of the arbitrators in the matter of Colchester
FERGUSON, J. North and Essex Centre; \$1,433.32. for the purpose of paying certain debentures issued under by-law No. 3. This by-law No. 3 is proved also, which shews that this money was a grant by the municipality for the promotion of a foundry and machine shop by way of loan, to the extent of \$10,000. The award above referred to was also put in and proved. The next following item in by-law No. 68 is \$153 for the purpose of paying certain school debentures issued under by-law No. 22. This by-law No. 22 is put in and proved, and recites that the school board of the village had applied to the council of the village for authority to borrow the sum of \$1,200, which the board deemed necessary for the completion and furnishing of the public school house in the village, and that it was expedient to grant the application, &c.

The next following item is \$392 for the purpose of paying certain debentures of the municipality issued under by-law No. 36. The by-law No. 36 is proved, and it recites that it was expedient that the corporation of the village should purchase suitable grounds for the holding of agricultural exhibitions within the limits of the village; that most desirable grounds and buildings could be procured for that purpose for the sum of \$4,500, which grounds were situated within the limits of the village, &c.; and refers to the Act 48 Vic. giving the corporation of this village certain powers to borrow money and issue debentures for this purpose. In each instance in the by-law the rate to be levied is mentioned, and the by-law provides that the moneys shall be collected and paid to the treasurer of the corporation on or before the 14th day of December, 1886. The by-law bears date the 21st day of September, 1886. The rates in the by-law seem to be the same as in the rolls.

In the case *Haacke v. Marr*, 8 C. P., at 442-3, the learned Chief Justice who delivered the judgment of the Court pointed out the distinction between cases in which the authority of a municipal council to pass by-laws was to be exercised directly and immediately under the pro-

visions of the statutes of the Province, without any condition precedent necessarily interposing before the authority could be lawfully exercised, and cases in which the authority can only be exercised either upon the request or with the consent of other parties.

In the former cases the by-law passed within the scope of the authority would, by itself, protect and justify those officers whose duty it was to carry it into effect; but in the latter cases it might be necessary to shew that the by-law was passed upon such request or with such concurrence or consent. It may be that some of the items or clauses of this by-law No. 68 fall under the latter class of cases or instances; but it is manifest, I think, that a large part of the provisions of the by-law does not. Further, the recitals in the preceding by-laws to which I have referred, and the award also referred to, are before me. The pleading of the plaintiff, where he says he was not duly assessed and did not become liable to pay these taxes, is of the most general character. It does not particularize or specify any defect or defects in the assessment, or any want of authority to assess the plaintiff as he was assessed. The amount of taxes mentioned or referred to in the avowry need not be accurately stated; according to the general rule a precise statement of this is not material, and the defendant has placed it under the *videlicet*. No tender of any amount of taxes has been shewn or even mentioned. The action is not for excessive distress or for distraining for too large a sum.

On this branch of the case counsel did not in argument specify the defects, if any, on which he relied. Such being the facts and circumstances, I am of the opinion that it is proper to say that the first paragraph of the defendant's avowry has been established, and I find the issue raised upon the plaintiff's first plea for and in favor of the defendant.

As to the issue raised upon the plaintiff's second plea; by-law No. 42 is a by-law to assess and levy the rates for the purposes of the year 1885, and by this the defendant

Judgment. was appointed collector to collect these taxes and rates.
FERGUSON, J. This seems to me clearly a good appointment of the defendant for the year 1885. By-law No. 68 is a by-law to levy the rates for the purposes of the year 1886, and this provides that these rates shall be collected and paid over by the collector of rates for the village. This bears date the 21st September, 1886, and on the 23rd day of the same month (just two days after the passing of this by-law) the defendant gave to the municipality the bond of himself and two sureties in the sum of \$8,000, conditioned for the due performance of his duties as such collector for the year 1886. This bond recites that the defendant was appointed collector, &c. The bond was accepted by resolution on the 23rd December, 1886; and it seems to me entirely plain that the "collector" referred to in the last clause of by-law No. 68 is the defendant, and if so, there was a good appointment by by-law of this defendant as collector for the year 1886; and I find the issue raised upon the plaintiff's second plea for and in favor of the defendant.

There was some discussion as to whether or not the defendant had made the declaration of office required by 46 Vic. ch. 18, sec. 273, (O.) The defendant said he did not recollect having done so. This is by law required to be in writing and subscribed by the officer. It then, as I understand, becomes a record in the hands of the municipality. There is no evidence of any search having been made for any such document, or that it did not exist. The necessary and proper bond was given at the proper time. An officer might well not be able to recollect having made the declaration, and yet upon search the document might be found. Even if this were a crucial matter, the presumption would, I think, be, under all the circumstances, in favor of its having been done, and it has not been shewn that it was not done; besides, there is no issue raised specifically in regard to the matter.

The issue raised upon the third plea I have virtually already disposed of, for the plaintiff's name was set down,

&c. This issue I also find for and in favor of the defendant. Judgment.

FERGUSON, J.

As to the issue raised upon the fourth plea ; the roll was delivered to the defendant about the first day of January, 1887, and was in his possession from that time down to the commencement of this action. On the 7th day of March, 1887, the council passed a resolution that the defendant be instructed to enforce the payment of the uncollected taxes for 1886. On the 14th November, 1887, the council passed another resolution that the defendant be instructed to have the roll returned by the 24th of the same month. In each of these resolutions the defendant is mentioned by name. The latter resolution goes on, and adds the words : " And that the time will not be further extended."

These additional words do not, I think, make any difference in considering the effect of the resolution as applicable to this case. They constituted a certain premonitory warning to the defendant, but were a matter with which the plaintiff or any other ratepayer had no concern. The roll did in fact remain in the hands of the defendant after the time fixed by this resolution for its return, and up to and after the time of the distress of which the plaintiff complains. In the meantime the position of the defendant in this respect was, I think, nothing different from the position of any collector of taxes who has not returned the roll by the time originally fixed for that purpose. The case *Langford v. Kirkpatrick*, 2 A. R. 513, relied on by counsel, has no application, because there the roll had been returned before the distress. The by-law appointing Richard Wolfe collector of the rates for the year 1887 was passed on the 23rd December, 1887. It was contended that at this date the defendant ceased to be collector, and became and was *functus officio*. This, I think, cannot be so, looking at the nature of the return that he was by law obliged to make, and, besides, Wolfe was not appointed collector to collect the rates that were to be collected by the defendant, and there was no removal of the defendant

Judgment. by the council (46 Vic. ch. 18, sec. 281); on the contrary of
FERGUSON, J. this, he was subsequently (on the 17th January, 1888), instructed by the council to collect; but this was after the distress complained of.

The case *Newberry v. Stephens*, 16 U. C. R. 65, which has been followed in subsequent cases, appears to me to decide that, so long as the collector has not returned the roll, he is at liberty to go on and levy where he finds distress. See the language of Robinson, C. J., on p. 68, and that of Burns, J., on p. 76. Looking at this case and many others to which I was referred, I am of the opinion that the roll was lawfully in the hands of the defendant at the time of his making this distress, and I think the issue or issues raised upon the fourth plea must be found for and in favor of the defendant.

It is clearly proved that the demand of payment was properly made, and the issue raised upon the fifth plea must also be found for and in favor of the defendant.

The issues raised upon the sixth, seventh, eighth, and ninth pleas, must also be found and decided respectively (some of them being issues of law, or of mixed law and fact) for and in favor of the defendant also.

All the issues being thus found and decided in favor of the defendant, the judgment must be in favor of the defendant upon the whole of the case, and *with costs*.

If a return of the goods is necessary and desired, the matter may be spoken to on settling the judgment.

The plaintiff appealed from the judgment of **FERGUSON, J.**, and his appeal was argued before a Divisional Court, composed of **ARMOUR, C. J.**, and **FALCONBRIDGE, J.**, on the 8th February, 1889.

R. M. Meredith, for the plaintiff. (1) The defendant did not shew any proper assessment to justify a collection by distress. Every pre-requisite must be accurately shewn : *Corbett v. Johnston*, 11 C. P. at p. 321; *Haacks v. Marr*, 8 C. P. 441; *Harling v. Mayville*, 21 C. P. 499; *Carson v.*

Veitch, 9 O. R. 706; *Free v. McHugh*, 24 C. P. 13; *Coleman v. Kerr*, 27 U. C. R. 5; *Dillon on Corporations*, sec. 820. (2) The roll was entirely invalid for the purpose of distraining. A statutory duty is imposed by the Assessment Act. (3) The defendant was not the collector and had no right to make distress. See sec. 282 of the Municipal Act, R. S. O. ch. 184. Section 279 does not apply. (4) The defendant, not having made the declaration of office required by the statute, was not in a position to distrain. (5) There was no proper or sufficient demand of taxes: *Chamberlain v. Turner*, 31 C. P. at p. 460. (6) If the defendant ever had any rights, he was, at all events, superseded when Wolfe was appointed collector. (7) The council of 1888 had no power to extend the time. The resolution of January had no effect. See *Coleman v. Kerr*, *supra*. (8) There was, in effect, no roll at all, because of the absence of the certificate required by sec. 120 of the Assessment Act, R. S. O. ch. 193. (9) The collector had no power to distrain after the time for return of the roll had elapsed. Amendments in the statutes since *Newberry v. Stephens*, 16 U. C. R. 65, have altered the law. See secs. 132, 133, and 145 *et seq.* of R. S. O. ch. 193.

S. H. Blake, Q. C., for the defendant, relied on the judgment of *Ferguson, J.*, and referred also to the following authorities: *Newberry v. Stephens*, *supra*; *McLean v. Farrell*, 21 U. C. R. 441; *McDonell v. McDonald*, 24 U. C. R. 74; *McBride v. Gardham*, 8 C. P. 296.

March 7, 1889. The judgment of the Court was delivered by

ARMOUR, C.J.:—

This was an appeal from the judgment of *Ferguson, J.*, directing judgment to be entered for the defendant in an action of replevin brought by the plaintiff for certain goods of his seized in the village of Essex Centre on the 9th day of January, 1888, as a distress for taxes assessed against

Judgment.
ARMOUR,
C.J.

him upon the last revised assessment roll for the said village for the year 1886, by the defendant, assuming to act as collector of the said taxes for the said village.

We do not think that there is any ground for our holding, nor are any reasons alleged why we should hold, that the plaintiff was not duly and legally assessed for the taxes in respect of which the said distress was made.

R. S. O. ch. 193, sec. 130, requires the clerk to deliver the roll certified under his hand to the collector on or before the 1st day of October, or such other day as may be prescribed by a by-law of the local municipality, but no by-law was passed, and the roll was not delivered by the clerk to the collector until about the 1st January, 1887.

R. S. O. ch. 193, sec. 132, provides that in towns, villages, and townships every collector shall return his roll to the treasurer on or before the 14th day of December in each year, or on such day in the next year, not later than the 1st day of February, as the council of the municipality may appoint; and section 133 provides that in case the collector fails or omits to collect the taxes or any portion thereof by the day appointed, or to be appointed as in the last preceding section mentioned, the council of the town, village, or township may by resolution authorize the collector, or some other person in his stead, to continue the levy and collection of the unpaid taxes in the manner and with the powers provided by law for the general levy and collection of taxes.

On the 11th December, 1886, the council passed a resolution that the collector proceed at once to collect the taxes for 1886, and that his salary be increased ten dollars.

This resolution was passed before the roll was delivered by the clerk to the collector. On the 7th March, 1887, the council passed a resolution that the council instruct P. Brady to enforce the payment of the uncollected taxes at once.

On the 14th November, 1887, the council passed a resolution that P. Brady, collector, be instructed to have the roll for 1886 returned by the 24th inst., and that the time will not be further extended.

Judgment.

ARMOUR,
C. J.

And on the 17th January, 1888, which was after the distress and before the replevy, the council passed a resolution that the time for the collection of the unpaid taxes for 1886 be extended until the 15th day of February, 1888, and that P. Brady be authorized to collect until that date.

And on the 21st September, 1888, the council passed a resolution that P. Brady, the collector, be sustained by the village corporation in the defence of the suit brought against him by E. C. Lewis, for seizure of goods for taxes of 1886; and that he be indemnified for any expense he may be put to in the case, so far as can legally be done by this council.

The roll for 1886 remained in the hands of the defendant from the time of the delivery thereof to him by the clerk, about the 1st January, 1887, until at and after the distress and replevy of the plaintiff's goods.

We do not think that the omission of the clerk to deliver the roll to the collector on or before the 1st October, and until the 1st January following, although it might render the clerk liable to the penalty imposed by section 225, had the effect of preventing the collector from proceeding to collect the taxes mentioned in the roll as soon as the same was delivered to him, or of rendering such proceedings invalid.

We think the provisions of section 120 directory, and not imperative in the sense of rendering the omission to deliver the roll to the collector on or before the time specified fatal to the collection of the taxes for the year in which the omission has been made.

The defendant was either the collector within the meaning of section 132 when he made the distress, and, having the roll still in his hands unreturned, was authorized to make the distress: *Newberry v. Stephens*, 16 U. C. R. 65; or he was a person authorized as collector, or in the stead of the collector, by the resolutions of the council, the roll not having been returned by him, to continue the levy and collection of the taxes under section 133, which provides no limit of time for the collection of the taxes in such case, and in either case the distress by him was valid.

Judgment.

ARMOUR,
C. J.

The plaintiff was a resident of the village in the year 1886, and was assessed as such in that year, and it was for the taxes in respect of such assessment that the distress was made, and there was no hardship in his being compelled to pay them.

The by-law for the assessment and levying of rates for the year 1885 was passed by the council of the village on the 11th December, 1885, and it was thereby provided that the rates imposed by this by-law should be collected and paid over to the treasurer on before the 14th December, 1885, by the collector of rates for the said village of Essex Centre, in so far as the law would enable him to do so; and it was thereby also provided that Patrick Brady should be and he was thereby appointed collector to collect said taxes, rates, &c.

On the 23rd December, 1886, the defendant entered into a bond with sureties as collector to the corporation of the village of Essex Centre, which recited that he had been chosen and appointed collector of rates for the said corporation, and on the same day a resolution was passed by the council of the village that the bonds of Patrick Brady as collector be accepted as presented to the council. No other appointment of the defendant as collector was proved, and the defendant swears that he did not think he made any declaration of office for any year.

The effect of the defendant not having made and subscribed the solemn declaration required by R. S. O. ch. 184. sec. 271, was to subject him to the penalty imposed by sec. 277, but it had not the effect of making his acts void. See *Margate Pier Company v. Hannam*, 3 B. & Ald. 266; *Rex v. The Justices of Herefordshire*, 1 Chitty 700. And having been duly appointed by by-law collector, he held office until removed by the council, even if what was done by the council in 1886 by resolution accepting his bond as collector, in which it was recited that he had been appointed collector, did not constitute a good appointment. See R. S. O. ch. 184, sec. 279.

On the 23rd December, 1887, the council passed a by-law

appointing Richard Wolfe collector of rates for the year 1887, and it was contended that this was in effect a removal of the defendant from his office of collector; but we do not think so, for Wolfe was only appointed collector of rates for the year 1887, and by R. S. O. ch. 193, sec. 12, the council of every municipality, except counties, shall appoint such number of assessors and collectors for the municipality as they may think necessary; but even if it had that effect, the roll for 1886 had not been returned by the defendant, and the resolution of the council of the 17th January, 1888, authorized him to continue the collection of the unpaid taxes under R. S. O. ch. 193, sec. 133, and legalized the distress then made. See *Woodfall*, L. & T., 8th ed., 394; *Whitehead v. Taylor*, 10 A. & E. 210.

Judgment.
ARMOUR,
C. J.

It was proved that the defendant duly demanded the taxes distrained for from the plaintiff on the 11th January, 1887, and this demand was sufficient to warrant the distress; and the fact that the defendant several times afterwards demanded the said taxes from the plaintiff did not affect the validity of the first demand, which was the only demand that was required.

We are of opinion, therefore, that the distress was lawful, and that the judgment of Ferguson, J., should be affirmed, and this appeal dismissed with costs.

[QUEEN'S BENCH DIVISION.]

LAING ET AL. V. SLINGERLAND ET AL.

Bail—Discharge—Action on recognizance—Surrender of principal—Notice of surrender—Exoneretur—Bail relieved on terms—Amount of recovery against bail—Rules 1062, 1064, 89.

The defendants were special bail for one S. upon a recognizance in an action by the plaintiffs against S.

The proceedings in the original action were begun and carried on in the county of Middlesex, and the condition of the recognizance was that S. would, if condemned, satisfy, &c., or render himself to the custody of the sheriff of Middlesex; or the cognizors, the present defendants, would do so for him.

R. S. O., 1877, ch. 50, sec. 40 (now Rule 1062) provides for the render of the defendant to the sheriff of the county in which the action against such defendant has been brought; and sec. 42 of the same Act (now Rule 1064) provides that special bail may surrender their principal to the sheriff of the county in which the principal is resident or found, and that upon proof of due notice to the plaintiff of the surrender, and production of the sheriff's certificate thereof, a Judge shall order an exoneretur to be entered on the bail-piece, and thereupon the bail shall be discharged.

The defendants on the 7th February, 1888, rendered S. to the sheriff of Norfolk, S. being found in that county, and obtained from the sheriff a certificate of such render but obtained no order for the entry of an exoneretur. The writ of summons in this action upon the recognizance was served on the defendants on the 10th of April, 1888, and on the 16th April, 1888, the defendants served on the plaintiffs a notice of the render of S. to the sheriff of Norfolk.

Held, that the bail were not entitled to be discharged, and that the plaintiffs were entitled to bring this action upon the recognizance, because no order for an exoneretur had been obtained, notwithstanding the notice of render; but that, the substantial duty of rendering the principal having been performed, the defendants should be relieved upon terms.

The Court ordered that upon the defendants filing an order for an exoneretur within two weeks and paying the costs of the action within ten days after taxation, the judgment for the plaintiffs should be set aside and all further proceedings stayed; otherwise judgment to be entered for the plaintiffs with costs.

Held, also, that under Rule 89 of T. T. 1856, (now Rule 1085) the liability of bail is limited to the amount of their recognizance; and the plaintiff having recovered in the original action the whole sum sworn to in the affidavit of debt, his recovery against the bail should not in any event be more than the former amount.

Statement.

THIS was an action against bail, tried at Simcoe before FERGUSON, J.

The facts appear in the judgments.

Gibbons, for the plaintiffs.

C. McDougall, Q.C., for the defendants.

December 12, 1888. FERGUSON, J.:—

Judgment.

FERGUSON, J.

The action is upon the recognizance against the defendants, who became special bail for the defendant in an action by the plaintiffs against one Darius G. Slingerland. The amount claimed for costs and condemnation money is \$705.51. The plaintiffs shew by an exemplification of the judgment, and it is not disputed, that they recovered this sum against Darius G. Slingerland in that action.

The present action was commenced by writ of summons tested the 6th day of April, 1888.

The judgment in the action against Darius G. Slingerland was recovered on the 20th day of March, 1888. The proceedings in that action were carried on in the county of Middlesex, and the venue was laid in that county.

The defendants set up as a defence that on the 7th day of February, 1888, they duly rendered the said Darius G. Slingerland to the custody of the sheriff of the county of Norfolk, pursuant to the statute in that behalf, who thereupon certified in writing that such surrender was duly made; that at the time of such surrender the said Darius G. Slingerland was residing in the county of Norfolk, and had been residing and carrying on business there before the commencement of this action. They also say that he has been continuously confined in the common jail of the county of Norfolk under the writ of *capias*, and is still so confined, and that since the 16th day of April, 1888, the plaintiffs have had notice and knowledge of this fact and of the render by them to the sheriff of Norfolk of Darius G. Slingerland. They also say that they had no notice of the judgment, and that there was no writ of *ca. sa.* or return thereto *non est inventus*, or otherwise, before the commencement of this action.

The plaintiffs, however, shew that they issued a *ca. sa.* to fix bail, which was tested the 21st day of March, 1888. This writ was made returnable within fifteen days after the receipt of it by the sheriff. It was delivered to the

Judgment. sheriff on the same 21st day of March, and returned *non FERGUSON, J. est inventus* by him.

The chief, if not the sole, matter of contention at the trial was as to whether or not the defendants had succeeded in shewing that they had properly, and according to the statute and the law, rendered their principal to the sheriff of the county of Norfolk, so as thereby to become discharged from liability to the plaintiffs upon the recognizance or bail piece.

The condition of the recognizance was that if the then defendant should be condemned in the action, he would satisfy the costs and condemnation money, or render himself to the custody of the sheriff of the county of Middlesex or that they, the cognizers, would do so for him. See sec. 40, ch. 50, R. S. O., 1877, the Act in force at the time. No question is raised as to the regularity or propriety of this recognizance.

Section 42 of the same Act provides for the surrender by special bail of their principal to the sheriff of the county in which such principal is resident or found, and for such sheriff receiving the principal into custody and giving such bail a certificate under his hand and seal of office of such surrender; and that a Judge of the Court upon due notice to the plaintiff or his attorney of such surrender, and upon production of the sheriff's certificate thereof, shall order an *exoneretur* to be entered on the bail piece, and that thereupon the bail shall be discharged.

There is no doubt that if bail do what is required by this section, they will be discharged. It was taken as one of the facts and not in any way disputed that the defendants did in fact render their principal to the custody of the sheriff of Norfolk at the time they in their defence say, and that the principal remained in such custody; and the defendants obtained a certificate of such render under the hand and seal of office of the sheriff, bearing date the 7th day of February, 1888; but no order has been obtained for the entry of an *exoneretur*, and none has been entered on the bail piece.

The defendants put in a writ of *capias ad satisfaciendum* issued by the plaintiffs in the original action, which was admitted to have been delivered to the sheriff of Norfolk on the 6th of June, 1888, charging the original defendant in execution, but I do not find this writ amongst the papers. Judgment.
FERGUSON, J.

A notice of render to the sheriff of Norfolk is put in and service of it admitted by the plaintiffs' solicitors on the 16th day of April, 1888. The writ of summons in the present action was served on the 10th of April, 1888. It appears by the admission of service of a notice of another character, and apparently given in certain proceedings under the Indigent Debtors' Act, that the plaintiffs' solicitors had knowledge as early as the 11th day of February, 1888, that the defendant was in close custody in the county of Norfolk; but it is not contended that they or the plaintiffs were given specific notice of the render to the sheriff of Norfolk until the 16th day of April, 1888, which was, however, within eight days of the time of the service of the writ of summons upon the defendants in this action.

Rule 88 of the Rules of Trinity Term, 1856, the one in force when these proceedings were had, now embodied in Rule 1084, is as follows:

"When the plaintiff proceeds by action on the recognizance of bail, the bail shall be at liberty to render their principal at any time within the space of eight days next after the service of the process upon them, but not at any later period; and upon notice thereof given, the proceedings shall be stayed upon payment of the costs of the writ and service thereof only."

The render mentioned in this Rule seems to me to mean a render in accordance with the condition of the recognizance, which is to the sheriff of the county in which the action against the original defendant has been brought; a render to any other sheriff being specifically provided for by section 42 of the Act before referred to, which provides for the obtaining of the order for entry of the *exoneretur* and the discharge of the bail, and not for a stay of pro-

Judgment. ceedings on payment of costs; and I do not think this
FERGUSON, J. Rule 88 is applicable to the case of these defendants; and besides, although they gave their notice of render within eight days of service of process upon them, yet, so far as appears, they did not pay or tender or offer to pay the costs of the writ and service, as provided by the Rule; and the case *Horn v. Whitcombe*, 5 Dowl. P. C. 328, by Baron Parke, under a Rule the same in this respect as Rule 88, seems to shew that the payment of the costs mentioned in the Rule is a condition on which the proceedings are stayed; and that if they are not paid, the plaintiffs may go on with the action. The words of the learned Judge, as reported, are: "The render itself was no stay of proceedings; and the plaintiff was compelled to go on with the action to recover his costs."

The case *Wright v. Tucker*, 6 U. C. R. 24, referred to more than once by counsel, seems to have been decided under a Rule quite different in its provisions, for the concluding part is, "and upon notice thereof given to the plaintiff or his attorney in the original suit, all further proceedings on the recognizance shall cease."

Then, if I am right in thinking that Rule 88, above referred to, does not apply to the case, the question is, has it been made to appear that the defendants did what was sufficient to enable them to avail themselves of the provisions of the 42nd section of the Act, and say that they were discharged?

They made the render or surrender to the sheriff of Norfolk, and they obtained his certificate. They gave notice to the plaintiffs' solicitors on the 16th day of April, 1888. This was after the return of the *ca. sa.* to fix the bail and after the commencement of this action.

It was objected by counsel for the defence that the *ca. sa.* against the principal was sent out and returned by the sheriff of Middlesex "*non est inventus*," whilst the plaintiffs' solicitors were aware of the fact that the original defendant was in custody, and in the gaol of the county of Norfolk, and that the *ca. sa.* was therefore bad. I do not

see that this contention can be sustained. The writ of Judgment. execution to fix bail must be directed to the sheriff of the county in which the venue is laid. It must be sued out and returned before any proceedings against the bail, for the bail are not bound to render their principal until they know, from the species of execution the plaintiff may think proper to adopt, whether he intends to proceed against the person of their principal or not; and for the purpose of affording the bail this information, the writ must be entered in the books kept in the sheriff's office for the purpose, and there must be a given time at least between the teste and return of the writ. FERGUSON, J.

In the present case I must assume that all this was regularly and accurately done, and it was all done before there was any formal or specific notice of any render or pretended render of the principal to the sheriff of Norfolk. The knowledge that the plaintiffs' solicitors obtained from the notice apparently given for entirely a different purpose, and under the Indigent Debtors' Act, certainly did not prevent the plaintiffs from issuing their *ca. sa.* to fix bail, and having it directed to the only sheriff to whom it could be directed, and the sheriff could make no other return than the one made by him, for the original defendant was not within his county.

It was contended that the fact that on the 6th day of June, 1888, the plaintiffs caused a writ of *ca. sa.* in the original action to be placed in the hands of the sheriff of Norfolk, charging the original defendant in execution, had the effect of discharging the bail, the present defendants. No authority was referred to in support of this. In *Read v. Hiltz*, 4 U. C. R. 175, it is said that where the sheriff is requested to return *non est inventus*, he need not search for the principal, but if he do, and arrest him, the bail are discharged. In *Higgen's Case*, Cro. Jac. 320, it is laid down that if the bail be arrested, although there be not full satisfaction, the plaintiff can never afterwards meddle with the principal. But if there be two bail, and one be in execution, the plaintiff may yet also take the

Judgment. other. And if the principal be in execution, the plaintiff
FERGUSON, J. cannot take the bail. But I do not think these cases bear upon the real subject of the contention, and if I am right in the view that I have stated respecting Rule 88 and section 42 of the Act, it appears, I think, that before this action the recognizance was forfeited. The defendants might have moved for, and very probably would have obtained the order for the entry of the *exoneretur*, had they given and proved proper notice to the plaintiff, as required by section 42, and would have thereby become discharged; but they did not do so, and the right of action against them accrued to the plaintiffs.

This right of action I think the plaintiffs had at the time they commenced this suit. There is no pleading by way of defence setting up matter arising after action, and after some search I have failed to find any authority shewing that the plaintiffs cannot recover. The defendants made the attempt to become discharged under section 42, but I am of the opinion that they did not do what was required to accomplish that object.

I am of the opinion that the plaintiffs are entitled to recover the amount of the costs and condemnation money in the original action from the defendants, together with the costs of this action, and the judgment will be accordingly.

The defendants moved before the Divisional Court, Hilary Sittings, 1889, to set aside this judgment, and enter judgment for the defendants, or for a new trial, upon the ground that the verdict was contrary to law and the evidence; and also for leave to amend their statement of defence by setting up that in June, 1888, after this action was brought, the plaintiffs issued a *ca. sa* to the sheriff of Norfolk, under which Darius G. Slingerland was arrested, and was thenceforth held by him until he was discharged by an order of the Court; that, in any event, the judgment should be reduced to \$540.55, the amount mentioned in the bail piece. They also gave notice of an application to the Court for an order that an *exoneretur* might be entered

on the bail piece and the defendants discharged from liability upon it. Argument.

The motion was argued on 7th February, 1889, before a Divisional Court composed of ARMOUR, C. J., FALCONBRIDGE and STREET, JJ.

Watson, for the defendants. The plaintiffs' proceedings against the bail were irregular from the time of the surrender of the principal: *Merryman v. Quibble*, 1 Chit. 128; *Lewis v. Grimston*, 1 Jur. 514; 5 Dowl. P. C. 711. The surrender was properly made to the sheriff of Norfolk: *Ballantyne v. Campbell*, 13 U. C. L. J. 224; *Wright v. Tucker*, 6 U. C. R. 24; Con. Rules 1064, 1084. I refer also to *Horn v. Whitcombe*, 5 Dowl. P. C. 328; *Byrne v. Aguilar*, 3 East 306; *Sherratt v. Floyer*, 2 Bing. 18; *Briggs v. Richardson*, 2 Dowl. P. C. 158; *Burks v. Maine*, 16 East 2; *Potts v. Baird*, 7 P. R. 113; *Grierson v. Corbett*, 8 P. R. 517.

The trial Judge was wrong, at any rate, in awarding the plaintiffs more than the amount of the recognizance: Con. Rule 1085; *Baker v. Jackson*, 9 O. R. 661; *Jonas v. Tepper*, 1 E. & E. 327; 5 Jur. N. S. 545.

Gibbons, for the plaintiffs. The procedure is given in Harrison's C. L. P. Act (2nd ed.), pp. 36 and 37, in notes to secs. 35-37 of the Act. Upon doing certain things the bail are entitled to be discharged. The English practice is different: there is no necessity in England for an *exoneretur*: *Bird v. Atkins*, 7 Dowl. P. C. 769. The plaintiffs had a bond which entitled them to the production of Darius G. Slingerland in Middlesex. The only way the defendants could escape producing him in Middlesex, or paying the debt and costs, was under sec. 37 of the Act as printed in Harrison, (now Con. Rule 1064). They have not brought themselves under that Rule, and they are not discharged. I refer to *Linley v. Cheeseman*, Drap. 55; *Read v. Scovill*, 16 U. C. R. 453; *McPherson v. Bail of Mosier*, 2 O. S. 491.

Judgment. March 7, 1889. The judgment of the Court was delivered by
STREET, J.

STREET, J. :—

By Con. Rule 1062, which is identical with and continues the former enactment, R. S. O., 1877, ch. 50, sec. 40, it provided that : " The condition of the recognizance of special bail shall be, that, if the defendant be condemned in the action at the suit of the plaintiff, he will satisfy the costs and condemnation money, or *render himself to the custody of the sheriff of the county in which the action against such defendant has been brought*, or that the cognizors will do so for him."

The action in which the recognizance in question was given was brought in the county of Middlesex ; the condition here, therefore, was, that the debtor should render himself to the sheriff of Middlesex.

But by Consolidated Rule 1064, identical with sec. 42, ch. 50, R. S. O., 1877, it is provided that " Special bail on production of a copy of the bail piece, * * may surrender their principal to the sheriff of the county in which the principal is resident or found ; * * and any Judge of the Court in which the action is pending, upon proof of due notice to the plaintiff or his solicitor of the surrender, and upon production of the sheriff's certificate thereof, *shall order an exoneretur to be entered on the bail piece, and thereupon the bail shall be discharged.*"

Under these enactments the bail may be discharged in two ways: 1st. By render of the debtor to the sheriff of the county in which the action is brought, without notice and without obtaining an order for *exoneretur*; or 2nd. By render of the debtor to the sheriff of a county other than that in which the action is brought, followed by notice to the plaintiffs' solicitor, and by the obtaining from a Judge of an order that an *exoneretur* be entered upon the bail piece.

In the present case the defendants rendered the debtor

to the sheriff of a county other than that in which the action was brought, and did nothing more until after the action, when they gave the plaintiffs' solicitor notice of the render, but stopped there; and to this day they have obtained no order for the entry of an *exoneretur*. Under these circumstances, it is clear that the bail have not done that which entitles them to be discharged. The only question is, whether the Court should exercise the right of relieving them from the breach of the recognizance, and if so, what terms should be imposed.

The plaintiff were entitled to bring their action upon the recognizance, because no *exoneretur* had been entered upon it, notwithstanding the notice of the render, because the bail piece itself is the best evidence as to whether or not the liability of the bail has been terminated, and the plaintiff is not bound in the absence of an *exoneretur* to accept the statement contained in the notice of render. The render itself is, however, the substantial duty which the bail undertake to perform, and the Courts seem to have been in the habit of giving relief upon terms where this duty has been substantially, though irregularly, performed: *Wild v. Harding*, 8 Mod. 281; *Brookhouse v. Sheriff of Derbyshire*, 5 B. & C. 244; *Anon.*, 1 Salk. 101.

The defendants here have been guilty of great delay in making their application to be relieved upon obtaining an order for an *exoneretur*; but in view of the fact that they rendered the defendant to the sheriff before this action was brought, and that the plaintiffs had notice of that fact, we are still entitled to relieve the defendants from the consequences of their omission formally to complete their discharge.

I think in any event the defendants are entitled to have the judgment reduced to \$540.55, the amount mentioned in the recognizance. Under Rule 89 of Trinity Term, 1856, now Con. Rule 1085, "Bail shall only be liable to the sum sworn to by the affidavit of debt, and the costs of suit, not exceeding in the whole the amount of their recognizance." The amount of the recognizance here is \$540.55,

Judgment. the plaintiffs having recovered in the former action the whole sum sworn to in the affidavit of debt; and I think the liability of the bail is to be limited to that sum.

STREET, J.

The proper order to make will, therefore, be that, if the defendant obtains and files in Court within two weeks an order that an *exoneretur* be entered on the bail piece, and also pays the costs of this action and of this motion within ten days' after the taxation, the judgment be set aside, and all further proceedings in the action be stayed. Otherwise that judgment be entered for the plaintiff for \$540.55, with full costs of this action and motion.

[CHANCERY DIVISION.]

DOMINION BANK V. OLIVER ET AL.

Banks and banking—Mortgage—Renewal notes—Warehouse receipts—Negotiation—R. S. C. ch. 120, sec. 53, subsec. 4.

Where a bank, holding a mortgage as additional security for the payment of certain notes, substitutes for these notes renewals from time to time, without, however, receiving actual payment, the whole series of notes and renewals form links in one and the same chain of liability, which is secured by the mortgage, although, as a matter of book-keeping, the bank may have treated the first notes, and the subsequent substituted notes as paid by the application of the proceeds from time to time of the renewals.

The simple renewal of notes by a bank is not a "negotiation" within the meaning of sec. 53, subsec. 4, of the Bank Act, R. S. C., ch. 120, so as to validate a warehouse receipt taken as collateral security therefor, no such new advance being made, and no such valuable consideration being given or surrendered contemporaneously by the bank as would represent the inception of a new transaction, and no change being wrought in the condition of the parties except the mere giving of time.

THIS was an appeal from the report of Mr. Winchester, official referee, made in this action on February 4th, 1889.

The action was brought by the Dominion Bank against J. D. Oliver and W. H. Knowlton, for specific performance of an agreement for the sale of land, which sale had been made by the plaintiffs under the powers of sale contained in two mortgages made by Patrick Burns to them, one

dated September 9th, 1879, and the other September 30th, *Statement*. 1879.

The defendants who were puisne mortgagees of the premises sold, immediately after the plaintiffs, in their statement of defence, amongst other things, charged that the plaintiffs' mortgages were made to secure certain promissory notes, and that some of these notes had been paid, and that little, if anything, remained due to the plaintiffs upon their said mortgages; and by counter-claim asked that an account might be taken of the amount due to the plaintiffs.

On January 20th, 1888, judgment was given referring it to Mr. Winchester, to ascertain the amount due to the plaintiffs as mortgagees.

By his report now appealed from, he found the amount due to the plaintiffs as mortgagees, and the defendants now contended that this amount was incorrect, for that the first mortgage of the plaintiffs had been paid off and satisfied by the dealings between the plaintiffs and Patrick Burns referred to at the commencement of the judgment of Boyd, C., and that as to the plaintiffs' second mortgage, they had obtained a warehouse receipt on coal as collateral to one of the notes comprised in that mortgage, and had improperly allowed the receipt to remain unenforced, and the coal covered by it to be sold by one Clarkson, to whom Burns had subsequently made an assignment for the benefit of creditors, whereas the plaintiffs should have enforced this warehouse receipt and applied the proceeds upon their mortgage.

As to the warehouse receipt, Mr. Winchester had held that being given under the circumstances which are mentioned in the judgment of Boyd, C., it was invalid, and that the plaintiffs were therefore not chargeable therewith.

The appeal came up for argument on March 28th, 1889, before Boyd, C.

Moss, Q. C., for the defendants. The dealings between the plaintiffs and Burns in respect to the first mortgage,

Argument.

amounted to a payment so far as the defendants are concerned. *Cameron v. Kerr*, 3 A. R. 30, is a different case. Upon general principles a second mortgagee becomes a surety in effect for the mortgagor, and any dealing which has the effect of giving time, discharges. But our principal ground is that the dealings amounted to payment, and we are entitled to the benefit of it: *Clayton's Case*, Tudor's Merc. Law L. C. 1. With regard to the warehouse receipt, it was taken after the debt was incurred. It was a proper warehouse receipt: *Bank of Hamilton v. J. T. Noye Manufacturing Co.*, 9 O. R. 631; *Re Coleman*, 36 U. C. R. 564. The receipt became a valid security, and could have been enforced at any time before or after the assignment. It was good even as against creditors. The Bank Act, now R. S. C. ch. 120, sec. 53, authorizes taking warehouse receipts. See especially sec. 53, sub-sec. 4. *Bank of British North America v. Clarkson*, 19 C.P. 187, is distinguishable. As to "negotiation," see *Griffin v. Weatherby*, L. R. 3 Q. B. 753; 9 B. & S. 726; *Foster et al. v. Bowes*, 2 P. R. 256. Here negotiation consisted of making a new note and discounting it, placing proceeds to Burn's credit, and allowing him to draw a cheque against it. I submit that was a sufficient negotiation within the meaning of the statute to enable the bank to hold the warehouse receipt.

W. N. Miller, Q. C., for the plaintiffs. What was done in respect of the first mortgage was only a matter of book-keeping: *Carruthers v. Ardagh*, 20 Gr. 593; *Cameron v. Kerr*, 3 A. R. 30; *Merchants Bank v. Moffatt*, 5 O. R. at p. 139; *Chalmers on Bills*, 3rd ed., sec. 251. The parties never intended what was done for payment. The fact that Burns is maker and indorser shews on its face that it was simply a book-keeping method. As to the warehouse receipt the defendants have no status to complain as to this matter. Besides, assuming that Burns was a warehouseman, the question arises is this a receipt of such a kind as is recognized by the Bank Act. *Bank of British North America v. Clarkson*, 19 C. P. 187, shews that a warehouse receipt given with a renewal note was not within the statute then

in force, which is the same as the present Act. Then **Argument.** as to the duty of a creditor holding a security like this, and as to his liability see *Synod v. De Blaquiere*, 27 Gr. 536, and *Municipal Corporation of Township of East Zorra v. Douglas*, 17 Gr. 462; *Bank of Montreal v. Davy et al.*, 21 C. P. 179; *Cunningham v. Buchanan*, 10 Gr. 523; *Smith v. Freyler*, 47 Am. Rep. 358.

Moss, in reply, referred again to *Cameron v. Kerr*, 3 A. R. 30, and *Inglis v. Gilchrist*, 10 Gr. 539; also to *Merchants Bank v. Smith*, 8 S. C. R. 539; *Re Monteith*, 10 O. R. 529.

April 1st, 1889. BOYD, C.:—

There was no payment in fact of the notes for which the mortgage was given. At their maturity they were taken up by the substitution of renewal notes, and these by other renewals, and so on, for some years, but no money or other consideration ever passed from the mortgagor to the bank during this course of dealing in respect of the debt itself represented by the original notes. The absence of the original notes, and the representation of them by the present renewals held by the bank, does not appear to me material in view of what is said in *Carruthers v. Ardagh*, 20 Gr. 593, on this point. The bank, no doubt, as a matter of book-keeping, treated the first notes and the subsequent substitutionary notes as paid by the application of the proceeds from time to time of the renewals, but in truth no payment in the proper sense of the term is proved. The whole series of notes and renewals form links in one and the same chain of liability which is secured by the mortgage.

Upon the other ground of appeal as to the warehouse receipt taken as a collateral security by the bank, no such special circumstances are in evidence here as appear in the *Bank of Hamilton v. J. T. Noye Manufacturing Co.*, 9 O. R. 631. In this case there was simply the renewal of certain notes in the hands of the bank, and the procuring of the warehouse receipt on the occasion of such renewal; no new

Judgment.

Boyd, C.

advance being made, and no valuable consideration being given or surrendered contemporaneously by the bank, which might represent the inception of a new transaction or negotiation of securities. In the Bank Act, R. S. C. ch. 120, sec. 53, sub-sec. 4, the negotiation of a note is put in contrast with its renewal; the mere renewal cannot be so read as to mean negotiation. This last term used as in the Act, refers to the original transfer of the negotiable instrument from the maker or holder to the bank, but not to intermediate transfers or renewals taking place during the currency of the liability whereby no change is wrought in the condition of the parties except the mere giving of time.

My judgment is in favour of the report on both grounds of appeal. Costs will follow the result.

A. H. F. L.

[CHANCERY DIVISION.]

ADAMSON V. ADAMSON ET AL.

Deed—Construction of—Trustees and beneficiaries as joint tenants, and not as tenants in common—Executed trusts—Estate in fee—Tenants in common—Mesne profits.

By a settlement certain lands were conveyed to trustees, upon trust to hold the said land * * situated * * being lot No. 2 * * to G. A.; and also lot No. 1, situated * * to A. A., sons of (the settlor) * * to the use of them their heirs and assigns as joint tenants, and not as tenants in common * * and, lastly, upon trust, that the said trustees * * shall, well, and sufficiently convey and assure, absolutely in fee to the said parties respectively, &c.

Held that this trust was an executed trust, in which the limitations were expressly declared, and that neither a difficulty in ascertaining the true construction and legal meaning of the words used, nor the final trust directing the trustees to make the conveyances of the legal estate made any difference: and that the words must receive the same construction as if they were found in a common law conveyance.

Held, also, that an estate in fee in Lot 2 passed to G. A., and that the words, "as joint tenants, and not as tenants in common," were used to prevent G. A. and A. A. from taking as tenants in common, as it was supposed they would have taken under 4 Wm. IV. ch. 1, sec. 48, and that they were needlessly used.

Held, also, that as G. A. died intestate and unmarried, after January 1st, 1852, the defendants, as the children of a deceased brother of the plaintiff, took an equal share in the lands as co-tenants in common with the plaintiff A. A.: that they were as much entitled to the possession of the lands as the plaintiff, and that the plaintiff having obtained the legal estate from the trustees should hold the same as a trustee for all the tenants in common.

Held, also, that there being no proof of ouster of the plaintiff, he could not recover from the defendants any *mesne profits* in this action.

THIS was an interpleader issue ordered to be tried between Alfred Adamson as plaintiff, and Charles F. Adamson, George D. Adamson and Mary Olive Adamson, to try the right to the possession of lot number two, in the second range in the Credit Indian Reserve, north of Racey's tract in the township of Toronto. Statement.

The facts appear in the judgment.

The evidence was taken at the trial at Toronto, on May 19th, 1888, before FERGUSON, J.

James Maclellan, Q. C., and R. Maclellan, appeared for the plaintiff.

Statement. *McCarthy*, Q.C., for the defendants Charles and William Adamson.

Donald, for the defendant Mary Olive Adamson.

Subsequently the argument took place in January 8th and 9th, 1889.

The Attorney-General of Ontario, and *Thos. Langton*, appeared for the plaintiff.

McCarthy, Q. C., and *W. Nesbitt* for the defendants.

The Attorney-General and *Thos. Langton*, for the plaintiff. The words, as joint tenants, cannot be rejected. The trust was in favor of George and Alfred as joint tenants, subject to a life estate in each lot to George and Alfred, respectively, and the survivor took the fee: *Leith's Blackstone*, 2nd ed., 255-258; *Doe d. Littlewood v. Green*, 4 M. & W. 229; *Doe d. Amlot v. Davies*, 4 M. & W. 599, at p. 607, per Lord Abinger. The evidence does not shew that the defendants, the sons, took possession, but merely that they might try and see if they were able to work the place themselves: *Orr v. Orr*, 31 U. C. R. 13; 21 Gr. at p. 415; *Jibb v. Jibb*, 24 Gr. at p. 494; *White v. Haight*, 11 Gr. 420; *McArthur v. McArthur*, 14 U. C. R. 544; *Rumrell v. Henderson*, 22 C. P. 180; *Elphinstone, Norton and Clark on the Interpretation of Deeds*, 40, 76, 90, 93; *Goodtitle v. Gibbs*, 5 B. & C. at p. 717; 2 Cruise's Dig. 364; 2 Preston on Abstracts, 76; *Goodtitle v. Bailey*, 2 Cowp. at p. 600.

McCarthy, Q. C., and *W. Nesbitt*. for the defendants. George should take one lot and Alfred the other; *Adamson v. Adamson*, 7 A. R., per Patterson, J. A., at p. 598; 4 Comyn's Dig. 107-108. The plaintiff might recover against the defendants' mother by shewing he was co-heir when she had no right to possession; but he cannot recover against these defendants, because they are also co-heirs. The mother was in as bailiff for her children, and they have acquired a title by possession: *Wall v. Stanwick*, 34

Ch. D. 763; *In re Hobbs, Hobbs v. Wade*, 36 Ch. D. 553; Argument. *Adamson v. Adamson*, 28 Gr. 221.

The Attorney-General, in reply, .

April 4, 1889. FERGUSON, J. :—

This action is brought pursuant to an order made the 28th day of May, 1887, whereby it was directed that the plaintiff should commence and prosecute an action against these defendants, who then claimed to be in possession of the land mentioned in the writ of possession in a former suit, *Adamson v. Adamson*, to try whether the defendants were entitled to have possession of the land as against the plaintiff. The former suit had been brought against the mother of these defendants. As against her the plaintiff succeeded, but she was not, as I understand, in possession when the sheriff went to execute the writ of possession, but these defendants claimed to have the possession and to be entitled to it. Hence the application on which the order was made.

The lands in question are lot number two in the second Range, in the Credit Indian Reserve, north of Racey's tract in the township of Toronto; and the plaintiff asks that it be declared that the defendants are not entitled to the possession of them; an order for the payment of *mesne* profits against the defendants and an order for the delivery of possession to him.

The lands are a parcel of the lands embraced in a conveyance by way of lease and release in trust, bearing date the 9th day of August, 1837, made by the late Joseph Adamson, of the first part, and the Honourable Peter Adamson and James Coleman of the second part, and so far as appears material here, the frame of the deed (which may be called a settlement in favour of the wife and children of the settlor), other than some of the children who had been otherwise provided for, may be shortly stated as follows :—

Joseph Adamson, the settlor, granted, bargained, sold.

Judgment. aliened, remised, released, and confirmed to the trustees, their heirs and assigns, all the lands mentioned in the deed, consisting of many parcels, to have and to hold "the said several lands, hereditaments, and premises," unto the trustees "as joint tenants and not as tenants in common, their heirs and assigns, and to their own use and benefit for ever." "Nevertheless subject to and under the several provisoes, trusts, limitations, confidences, and agreements hereinafter expressed, limited, declared, and approved of and concerning the said several lands and premises." *
Ferguson, J. Provided, nevertheless, and these presents are upon the express condition that the said several lands and premises * * * shall be held and possessed by the trustees, their heirs and assigns, to and for the several further uses, trusts, interests, intents, and purposes, and upon and subject to the several powers, provisoes, declarations, and agreements herein limited, declared and expressed of and concerning the same, and for no other purpose or intent whatsoever, that is to say : " Then follows the trust in favour of the wife of the settlor in respect of all the lands for the term of her natural life, after which is a trust in favour of the oldest son, James Adamson. After this is declared the trust out of which this contention (in part) arises. The words employed are these :—" *Secundo. Upon further trust to hold the lands and premises situated in the township of Toronto, being lot number two, with the appurtenances to the said George Adamson. And also lot number one, situated in the said township to the said Alfred Adamson, sons of the party of the first part (the settlor), said lots extending to two hundred acres more or less, being the subjects secondly before granted and released, or intended so to be, and all right and interest therein and thereto belonging, to the use of them, their heirs and assigns as joint tenants and not as tenants in common.*"

Then follows a trust in favour of Mary Adamson, the only daughter of the settlor, and another trust having relation to the death of George, Mary, or Alfred, before majority without leaving lawful issue, and providing that

the share of the one so dying should descend and accrue Judgment.
to the survivors or survivor, and their heirs "except as FERGUSON, J.
hereinbefore specially mentioned and provided." There
is then what may be called the final trust, expressed and
declared in these words:

"And lastly upon trust, that the said trustees or the survivor of them shall well and sufficiently convey and assure absolutely in fee to the said parties respectively, at the times and in the manner hereinbefore mentioned, their heirs and assigns, the said several lands and premises, freed, and discharged from all manner of trusts and encumbrance whatsoever, excepting those particularly before recited."

This conveyance (settlement) certainly cannot be said to be well drawn. Some parts of it, especially some passages occurring in the declaration of trust in favour of the daughter, Mary Adamson, which I have not set out, are difficult indeed to understand. The document, I think, fully merits the remarks made in regard to it by Mr. Justice Patterson, when delivering his judgment in the Court of Appeal in the former case *Adamson v. Adamson*, 7 A. R. 594, *et seq.*

In the case *Egerton v. Earl Brownlow*, 4 H. L. C. 1, Lord St. Leonards, speaking of the will in that case, said at p. 211: "I trace the hand of a master in every part of it." The same cannot, I think, be properly or truthfully said in the present case in regard to this settlement. It is, in my opinion, by no means a well drawn conveyance. The part of it, however, with which I have particularly to deal at present, is the trust expressed and declared in favour of George and Alfred, under the word "*Secundo*," the words of which I have before set forth, for the estate given to, or that came to the plaintiff Alfred Adamson, by reason of this, or in consequence of facts that subsequently occurred taken in conjunction with it, has, I think, a very important bearing upon the result of this litigation, and what will be the proper judgment in this case.

Then applying this trust to lot two alone, which is the only land in question here, and depriving the trust of the words that are unnecessary in considering what is the

Judgment. proper meaning and effect, it seems to me that it may be
FERGUSON, J. read shortly thus :—

Upon further trust to hold lot number two to George to the use of George and Alfred their heirs and assigns as joint tenants and not as tenants in common. The necessary verbal changes being made, I think the trust respecting lot one might be expressed in a similar manner and, so far as I can see, this is a proper and convenient way of looking at the trust regarding this lot two with a view of ascertaining the real meaning of it, or true construction to be placed upon it. Looking at the matter in this way, which I think is not an improper way, it appears to me that one avoids some danger of confusion of ideas or thoughts that might exist in examining the trusts respecting the two lots, by looking at the declaration in the words contained in the deed which I think I may call a compound statement.

George Adamson died, as I understand, in the year 1855. The widow of the settlor died in the year 1875. George never married, and did not leave any children or descendants, and he died intestate.

In Lewin on Trusts, 7th ed. ch. 8, sec. 1, sub-sec. 1, the law is stated to be that in creating a trust, a person need only make his meaning clear as to the interest he intends to give, without regarding the technical terms of the common law in the limitation of legal estates. An equitable fee, it is said, may be created without the word "heirs" and an equitable entail without the words "heirs of the body," provided words be used, which though not technical are yet popularly equivalent, or the intention otherwise sufficiently appears upon the face of the instrument, and further on, sub-sec. 3, the same author says: "But though technical terms be not absolutely necessary, yet where technical terms are employed they shall be taken in their legal and technical sense." At page 99 sub-sec. 3, the same author says that "at the present day it must be considered a clear and settled canon that a limitation in a trust, perfected and declared by the settlor, must have the same construction as in the case of a legal estate executed.

It was contended here for the plaintiff that it is manifest, said to be clear beyond all doubt, from the limitation contained in the deed, that the intention of the settlor was that George and Alfred should take and have an estate in joint tenancy in fee simple in the two lots, numbers one and two mentioned in the limitation: that to decide that they took such an estate in joint tenancy in these lots under the deed, would not infringe any of the legal rules respecting joint tenancies: that this manifest intention of the settlor should be given effect to as the matter is a trust and rests in equity and not at law: that it is no objection to such a tenancy, that it is in a remainder, or even depending upon a contingency, and that the moment the settlement was executed, this estate in joint tenancy came into existence and became the right of George and Alfred, and that upon the death of George, the whole estate in fee in remainder (the life estate being in the mother) was taken by Alfred, the plaintiff, by survivorship: (There were of course many other arguments for the plaintiff, but this is the one with which I am now professing to deal). Judgment.
FERGUSON, J.

For the defendants it was contended, amongst many other things, that by this limitation George took an estate for life in lot two: that Alfred took a like estate for life in lot one: that the joint tenancy mentioned in the limitation could not exist in fact till after the death of one or the other: that there were not objects of the limitation who could by possibility be joint tenants, and that a joint tenancy was therefore out of the case: and that besides there was a holding in severalty of the respective lots during the joint lives of George and Alfred, which could not consist with a joint tenancy in them. Reference was also made to the judgment of Mr. Justice Patterson, in the former case *Adamson v. Adamson*, in appeal, which it was not contended is absolutely binding on me, and to which I will hereafter refer.

In the same chapter of Lewin on Trusts, at p. 101, the author points out the difference between trusts executory and executed trusts, in this way: "A trust *executed* is

Judgment. where the limitations of the equitable estate are complete
 FERGUSON, J. and final; in the *executory* trust, the limitations of the equitable interest are intended to serve merely as minutes or instructions for perfecting the settlement at some future period: referring to *Egerton v. Earl Brownlow*, 4 H. L. C. 210, and *Tatham v. Vernon*, 29 Beav. 604, which latter case see at pages 614 and 615.

In discussing the difference between the two kinds of trusts, the author says, at page 101: "The true criterion in this. Wherever the assistance of this Court is necessary to complete a limitation, in that case, the limitation in the will not being complete, that is sufficient evidence of the testator's intention that the Court should model the limitations; but where the trusts and limitations are already expressly declared, the Court has no authority to interfere, and make them different from what they would be at law. For this statement the author refers to *Austen v. Taylor*, 1 Eden, 366, 368; *Stanley v. Lennard*, *ib.* 95; *Wright v. Pearson*, *ib.* 125, and these cases on examination seem to support the text.

In, and in the notes to the case, *Lord Glenorchy v. Bosville*, 1 W. & T. L. C. 1, 6th ed., the subject of executory and executed trusts, and the difference between the two is much discussed and many authorities referred to. In this principal case the Lord Chancellor says at p. 16: "I repeat it. I think in cases of trusts executed or immediate devises, the construction of the Courts of law and equity ought to be the same; for, there the testator does not suppose any other conveyance will be made; but in executory trusts he leaves somewhat to be done; the trusts to be executed in a more careful and a more accurate manner." In the notes the learned authors say at p. 18: "A trust is said to be *executed* when no act is necessary to be done to give effect to it, the limitation being originally complete. * * A trust is said to be *executory* where some further act is necessary to be done by the author of the trust or the trustees, to give effect to it." And, "It is now clearly established, that a Court of equity

in cases of *executed trusts* will construe the limitations in the same manner as similar legal limitations. * * * Judgment.
FERGUSON, J.

In cases, however, of *executory trusts*, * * * a Court of equity is not, as in cases of *executed trusts*, bound to construe technical expressions with legal strictness, but will mould the trusts according to the intent of those who create them.

A mere direction, however, to convey, upon certain trusts, will not render those trusts executory, in the sense in which the word is used * * * if the author of the trust has, as it were, taken upon himself to be his own conveyancer, and, instead of leaving anything to be done beyond the mere execution of a conveyance, has defined what the trust or limitations are to be in accurate and technical terms."

Lord St. Leonards in *Egerton v. Earl Brownlow*, *supra*, at p. 210, in speaking on this subject, says: "Has he (the settlor) left it to Court to make out from general expressions what his intention is, or has he so defined that intention that you have nothing to do but to take the limitations he has given to you, and to convert them into legal estates."

East v. Twyford, 4 H. L. C. 517, was the case of a very peculiar will in which the Court had difficulty in construing the limitations made, which appears certainly to have been made in a very peculiar and roundabout way; yet the Court was clearly of the opinion that the trusts were executed and not executory, and that they were not at liberty to mould and direct those limitations to carry into effect what they might suppose to be the intention of the testator, as in the case of an executory trust.

The cases on the subject of executory and executed trusts, and the difference between the two in regard to the mode of construing the words of the authors of them are numerous. I have examined a very considerable number of them, and I am of the opinion that in the present case, the author of this trust undertook to be and was his own conveyancer; that the trusts in the settlement are fully and finally declared; that nothing is left for the Court or the trustees

Judgment. to do in this respect ; that no further document declaring
FERGUSON, J. the trust was intended or anticipated ; that a difficulty in
ascertaining the true construction and legal meaning of the
words used by him in the limitation in question, can in
this respect make no difference, nor can the final trust
directing the trustees to make the conveyances of the legal
estate ; that this trust is to be considered an executed trust
in which the limitations are expressly declared ; and that
there is no authority to interfere so as to make them dif-
ferent from what they would be at law. And I think the
question here is, as to the true legal construction of the
limitation, as I have before stated it, in I think the fewest
possible words.

It has been urged that the rules of law cannot be applied
in the construction of this trust estate, because the whole
legal estate is by the settlement conveyed to and to the use
of the trustees, and that the word "use" employed in the
limitation in question, cannot, even as a matter of construc-
tion, be treated as anything but a trust pure and simple ;
but I think the real meaning of the law upon the subject
is, that where the trust is an *executed trust* you are to take
the words of the limitation separately from the language
whereby the estate is conveyed to and vested in the trus-
tees, and then ascertain the true construction of these
words at law, or as if they had been employed in a convey-
ance at law, and that for the purposes of construction, the
words "upon further trust to hold to George to the use of
George and Alfred their heirs and assigns as joint tenants,
and not as tenants in common," must be considered and
receive the same construction and have the same meaning
given to them for the purposes of construction as if they
were found in a feoffment, release or other common law
conveyance "to George to the use of himself and Alfred
their heirs and assigns, as joint tenants, and not as tenants
in common." I think this is the real meaning of the rule,
and I will endeavour to consider these words first, as if the
words "as joint tenants and not as tenants in common"
did not occur in the limitation, and afterwards offer my
view as to the use of these words.

Speaking still as to lot two (the one in question), and of the limitation as applied as above to this lot alone, it will be observed that it is not to George and Alfred, to the use of them, their heirs, etc.; nor is it to George and his heirs to the use, etc.; nor to George for life, with remainder to the use of George and Alfred, their heirs, etc.: but is as a conveyance to George, to the use of George and Alfred, their heirs and assigns. Ordinarily in a conveyance what is called the "premises" is what precedes the words "To Have and to Hold," and what immediately follows is the *habendum*, but in a case such as the present one, I think the "premises" if the term is applied at all, must be considered to extend to and include the name "George" when it first occurs.

If the limitation had been to George and Alfred, to the use of them, their heirs and assigns, there is authority for saying that without any words of inheritance immediately after their names where they first occur they would have taken an estate in fee at the common law and regardless of the Statute of Uses: *Jenkins v. Young*, Cro. Car. 230, 244. referred to and quoted in 1 *Sanders on Uses and Trusts*, at p. 93. But such is not the case.

By *Sammes's Case*, 13 Co., p. 54, also referred to in *Sanders*, p. 91, it appears that by the common law, generally speaking, no person could take a present interest by the *habendum* of a deed who was not named in the premises, and according to this, which is found also in other authorities, I think Alfred could not take here at the common law, because he is not named in the premises as I define these. As to him it is void.

But the same case and others show that as to George it is good, and the rule as laid down by Sir F. Bacon seems to be that the Statute of Uses ought to be so expounded that where the person seized to the use and the *cestui que use* is the one person he never takes by the statute, except there be a direct impossibility or impertinency for the use to take effect by the common law: See 1 *Sanders*, p. 94, and the case there stated. This rule is

Judgment. also found in the judgment in the case *Doe v. Prestnidge*, FERGUSON, J. 4 M. & S. 183.

It is also a rule of law, that if an estate be conveyed to two, the one being capable, and the other incapable, at the time of the grant, he who is capable shall take the whole : 1 Sanders, p. 135, (4).

Then, so far, the limitation would stand in effect, as if to George, to the use of George, his heirs and assigns, which at common law regardless of the Statute of Uses, would give George an estate in fee.

Then it is asked why cannot Alfred take, if not at common law, yet by force of the Statute of Uses, as it is perfectly competent for A. to stand seized to the use of himself and another : 1 Sanders, p. 96, third exception. But the seizin of the feoffee, releasee, &c., must be commensurate to the use declared upon it ; or, in other words the *cestuique use*, cannot have an estate in the use more extensive, than the seizin out of which it is raised. Thus if land be conveyed to A. for life, to the use of B. for life in tail, or in fee, the estate of B. must determine upon the death of A. : 1 Sanders, p. 109. If then it is said that George has a seizin in fee which is sufficient to serve the use to himself and Alfred, and that, therefore, Alfred should take by the statute, the answer is, I think, plainly given in the text in 1 Sanders, commencing at p. 91. The statute says : "That where any person or persons stand or be seized, &c., to the use, &c., of any *other* persons, &c., and therefore if a use be limited to a feoffee, &c., such use, generally speaking, is not executed by the statute, but the feoffee, &c., is in by the common law. In this case notwithstanding that the grantee is in by the *common law*, yet after the declaration of the use to him, he has not only a seizin, but a *use* ; although not the use which the statute requires, and therefore that seizin, which before the limitation of the use to himself, was open to serve uses declared to a third person, is by the limitation filled up, and will not admit of any other use being limited upon it.

It is said that whether feoffees take by the common ^{Judgment.} law, or by the statute yet where the use is once dis-^{FERGUSON, J}posed of to them and their heirs (whether the statute executes it or not), there cannot be a use upon a use, nor a trust upon such a use to be executed by the statute.

The reason given for this construction is, that before the statute, real property was divided into use and possession; but there was no third kind of interest then known. Consequently, when the seizin was transferred to A. and his heirs, and it was added to *the use* of him, and *his heirs*, he had both the legal and beneficial interest; and there is nothing in the statute to alter the nature of his estate.

The result at which I arrive in examining the limitation in this way, and apart altogether from any force or effect of the words "as joint tenants and not as tenants in common," is that an estate in fee simple passed to George. This is the same as the conclusion of Mr. Justice Patterson in the former case, although he seems to have arrived at it by a shorter and less circuitous mode.

Then, as to the added words "as joint tenants and not as tenants in common." This settlement was executed in the year 1837, three years after the passing of 4 Wm. IV., chap. 1, sec. 48, providing that when after the day mentioned in the section, land shall be granted, etc., to two or more persons other than executors or trustees, in fee simple, or for a less estate, it shall be considered that such persons took or take as tenants in common, and not as joint tenants, unless an intention sufficiently appears on the face of the grant, etc., that they shall take as joint tenants: and it appears to me that those words were used to prevent, or with the intention of preventing George and Alfred from taking as tenants in common, as it was supposed they would have done under the provisions of that statute, and leave the settlement to take effect in this respect, as it was supposed it would have done before the passing of that statute, namely, to give an estate in joint tenancy.

If, however, I am right in the construction to be given to the limitation, apart from these words, there could not have

Judgment. been a tenancy in common at all under the provision of the statute, and in this view of the matter, these words were needlessly used. If it is said that, treating the matter in this way, and so giving no effect to these words, defeats the intention of the settlor, and if it be assumed that this is true, I am unable to perceive how this undesirable result can be avoided.

FERGUSON, J. In the case *Tatham v. Vernon*, 29 Beav. 604, the settlor had made a will in April, 1824. The settlement was executed in June, 1825. The Master of the Rolls, after holding that the trusts of the settlement were executed and not executory trusts, said: "And although I arrive at this conclusion with regret, because the settlor does not seem to have been aware that the deed revoked his will, still, I am clearly of opinion, that the settlement only gives life estates to the children of the settlor," &c. There are, I think, many cases in the books in which the apparent intention of the settlor or grantor has been disappointed, by the construction placed upon the words he used in his deed.

The *Marquis Cholmondeley v. Clinton*, 2; *J. & W.* 1, is amongst the strongest cases, going to show that the intention of the author must be respected and given effect to; yet, Sir Thomas Plumer, M.R., makes exceptions of the instances on which the subject on which the question arises is a matter of law, or the words to be construed are words of limitation. See pages 92 and 93; and in *Doe Hanley v. Wood*, 2 B. & Al. 724, Chief Justice Abbott, said at p. 741: "The question properly is not what the grantor supposed he had done, but what he really had done by his grant."

For these reasons that I have endeavoured to give, I am of the opinion that the trust in question is an executed trust; that it is to be construed according to the rules of law, and that according to its true construction George Adamson took by it an estate in fee simple; in this number two, subject, of course, to the life estate of his mother in the same.

It was agreed that George died, not having married and ^{Judgment.} intestate, after the passing of the Act respecting the des ^{FERGUSON, J.} cent of real property, that came into force on the first day of January, 1852. His father being at that time dead, his brothers and sisters would each take by descent each a share of the property, under the provisions of the Act. The plaintiff would thus be entitled to one share, and the defendants being the only children of the brother, Charles Adamson, who died in 1862, having made no will affecting this lot number two, are entitled to another share. I understand the number of the members of the family is or was such, that the shares are one-fourth parts.

This action then is an action such as that formerly called an action of ejectment, by one tenant in common against his co-tenants in common, having amongst them a share equal to the plaintiff's share in the lands in question, if nothing more were to be said in regard to their rights.

Two of the defendants, however, contend that they have gained title to the land by length of possession. It is undisputed that the plaintiff's mother had in equity an estate for life in this land. The right of George Adamson was an estate in remainder in fee to come into possession upon the death of his mother. This estate was also an estate in equity, the legal estate being in the trustees of the settlement. Upon the death of George in 1855, Charles, the father of the defendants inherited an undivided one-fourth of this remainder in fee.

I think the evidence shows that the defendant's father in 1863, became tenant of his mother, the life tenant, at a rental of £30 per annum, and that at the time of his death he was such tenant. The defendant's mother continued in possession from the time of the death of her husband Charles, until she went out in, I think, 1885, at the time the writ of possession was issued in the former suit, *Adamson v. Adamson*. It was contended that her possession was in law, the possession of her children on the ground that they inherited the possession of the whole lot

Judgment. from their father Charles, and the case *Asher v. Whitlock*, L. R. 1 Q. B. 1, was relied on for the proposition, but I do not think that case applicable. The interest that Charles had as such tenant, was not, I think, such an interest as could be so inherited. The contention that Charles was in possession pursuant to an expectation of having the land conveyed or transferred to him in lieu of lands that it was said he sold for the purpose of relieving another brother, William, from some difficulties that were vaguely spoken of, I think fails entirely, and I think the contention that these defendants were in possession of the whole of the lot, or rather that the possession by their mother of the whole lot from the time of the death of their father is to be attributed to them must fail.

It was contended that in September, 1875, a change took place, that assuming that the mother of these defendants had up to that time been the one occupying the farm and carrying on the business thereon; the sons at that time 18 and 16 years old respectively, under an agreement with the mother or with her consent, took possession and charge of the farm, and thereafter and up to the commencement of this action carried on the same; that this possession was adverse to the plaintiff, and as of right, and that thereby the male defendants gained a title as against the plaintiff.

[The learned Judge then summed up the evidence of several witnesses, as follows, and continued:]

I am of the opinion that it has not been made to appear that the change in 1875 contended for, took place, or that since that period the farm has been carried on by the sons, and not the mother. I have perused the evidence taken before my brother Street, and that given before myself with I think some care, and such is my conclusion. I really have not any doubt that such is the true finding upon the evidence taken as a whole.

So far as I am able to perceive, the case stands in this way. George Adamson died in 1855, intestate, entitled to an estate in fee in remainder in this lot, subject to the life estate of his mother who died in 1875.

Upon George's death, his brother Charles, the father of Judgment. the defendants became entitled to a one-fourth interest in FERGUSON, J. this remainder, the plaintiff to another one-fourth interest, and each of two others to a one-fourth interest, and Charles was tenant of his mother when he died. He having made no will affecting this land; his children, the defendants, became entitled to his one-fourth interest, and the possession of the defendants' mother from the death of their father to the year 1885, when she went out of possession, may, as to their one-fourth interest amongst them be attributable to them, or be considered their possession, and she a caretaker, as regards that one-fourth interest.

I think the case in *re Hobbs, Hobbs v. Wade*, 36 Ch.D., 553, tends strongly to show that the possession would be, as it were, divisible and divided in this way. This is the most that can be said in favour of the possession of the defendants I think during that period, for I think it cannot be that the law would say that by reason alone of their having title, they are to be considered in possession of any greater share or any more than that to which they had title, when and so long as another was in fact in possession, and I do not care to examine very minutely as to whether or not, the defendants were in possession in law even to this extent, because I do not see, that this can make any difference for possession *quoad* their own share would not gain title as against the plaintiff, in respect of his one-fourth interest. I do not think the defendants or any of them have gained any title as against the plaintiff by length of possession.

The case seems to me to stand thus: A tenant in common entitled to a one-fourth interest, brings the action against his co-tenants in common, entitled amongst them to a like one-fourth interest to recover possession of the land, and for the other relief before mentioned.

The order pursuant to which the action is brought, directs the bringing of the action to try whether the defendants are entitled to hold possession of the land, as against the plaintiff.

Judgment. The plaintiff by his statement of claim, asks that it be
FERGUSON, J. declared that the defendants are not entitled to the possession of the lands; an order for payment of *mesne* profits, and for delivery of possession to him.

I am of the opinion that the defendants are as much entitled to the possession of the land in question, as is the plaintiff. They are simply co-tenants in common.

The plaintiff having obtained the legal estate from the trustee and trustees under the settlement, I think holds the same as a trustee for all the co-tenants in common.

The plaintiff claims to be entitled to the possession of the whole, and that the defendants are not entitled to possession at all.

The defendants, by one of their defences, claim as co-tenants with the plaintiff; but I do not find upon the record any notice limiting their defences, such as mentioned in sec. 56, chap. 51, R. S. O. 1877, and no question of *ouster* such as mentioned in sec. 57 of the same chapter seems to have been directly raised. The action was commenced on the 31st May, 1887, and before the R. S. O. 1887, came into force, and also before the new rules of practice. I cannot say that the defendants are entitled to possession as against the plaintiff, as is mentioned in the order; nor can I declare that the defendants are not entitled to the possession, as asked by the plaintiff.

The defendants say that they are entitled to share in the *mesne* profits recovered in the former action against their mother the defendant therein. I do not now know precisely how the matter of such *mesne* profits stands. I am desirous of hearing in my chambers at some convenient time, what counsel may say as to the proper form of declarations to be made: (as this action is, as it were, a creature of the former action) as to the matter of costs: and as to the share claimed by defendants of the *mesne* profits aforesaid: as well as in respect to the *mesne* profits claimed in this action.

Afterwards,

Counsel now agree in saying that a declaration that the plaintiff and the defendants are tenants in common, with

another or others in the lands in question, will under all ^{Judgment.} the circumstances be sufficient; the three defendants ^{FERGUSON, J.} amongst them being entitled to one share—that of their father—and a declaration to this effect will be drawn in apt words.

As to the provisions of sections 56 and 57 of chap. 51, R. S. O. 1877, before referred to, I find that in the schedule to the R. S. O. 1887, these as well as section 75 are marked “not consolidated,” and in the other schedule, the one respecting “Acts repealed;” the third column says the whole of this chapter 51, except these three sections: and the new consolidated rules do not seem to embody these two sections or either of them.

The Judicature Act (1881), repeals all enactments inconsistent with that Act, and seems to profess to provide for a full practice in actions for the recovery of land.

Rule 66 of the last mentioned Act provides for a defendant limiting his defence to a part of the land, much the same as was provided in the former ejectment Act, and declares that when the defence is not so limited, it shall be considered a defence for the whole; but this does not bear upon the present question.

Rule 144 says: “No defendant in an action for the recovery of land who is in possession, by himself or his tenant, need plead his title, unless his defence depends upon an equitable estate or right. * * * But except in the cases hereinbefore mentioned, it shall be sufficient to state, by way of defence, that he is so in possession. And he may nevertheless rely upon any ground of defence which he can prove, except as hereinbefore mentioned.” Owing to the late recognition by the Legislature of the existence of the two sections in question here, it is difficult to arrive at the conclusion that they are not in force, or were not in force at the commencement of this action. Section 56 seems, however, to be permissive only, according to the words actually employed in it, and the operation of section 57 depends upon a defendant having availed himself of the provisions of section 56.

Judgment.
FERGUSON, J. Again, the matter is one of pleading or proceeding only, and it appears to me that Rule 144 above referred to is sufficiently comprehensive to embrace such a case as the present one, and to justify the course of pleading adopted by the defendants. Besides, one who has heard the whole case cannot fail to perceive the difficulty, if not entire impossibility, of the defendants making the affidavit referred to in section 56

There was much contention as to whether an *ouster* had been shown by the evidence and a number of cases referred to. It is laid down that a demand of possession by one tenant in common and a refusal by the other, *stating that he claimed the whole*, is evidence of an actual *ouster* of his companion: see *Doe Hellings v. Bird*, 11 East 49, and many authorities are to the same effect.

In none of the cases that I have seen, however, was the demand such as was what is relied on as a demand here namely: the sheriff coming with a *habere facias* to give possession to the plaintiff, which undoubtedly meant possession of the whole, requiring the defendants, (by whom I mean the two defendants who claim to have been in possession) to go out. It is impossible not to see that such was the real fact. This the defendants refused to do,

It was said in argument that these defendants had resisted the sheriff and claimed the whole; but looking at what came before me at the trial—and I am confined to this—I cannot find the fact to be otherwise, than as I have stated; and assuming such to be the fact, it cannot, I think, be said that an *ouster* has been proved. It is plain beyond cavil that the plaintiff never desired to get possession, or occupy as a co-tenant with the defendants. What he wanted was the whole, and to put the defendants out altogether.

The defendants pleaded in the alternative that they were tenants in common. This was virtually traversed by the plaintiff. The issue reached the substance of the action, and upon it the defendants succeed. They are therefore entitled as against the plaintiff to the general costs of the

cause ; but they must pay the plaintiff his costs of the ^{Judgment.} issues raised upon their pleadings, in respect of which they ^{FREYBUSH, J.} failed and the plaintiff succeeded. These costs to be set off or set off *pro tanto* one against the other.

I am of the opinion that the defendants are entitled to their proportionate share of the benefit of the recovery by the plaintiff of the *mesne* profits or damages in the former suit against their mother. In respect of that recovery the plaintiff is, I think, a trustee for the defendants in respect of their share thereof. I am of the opinion that the plaintiff cannot recover from the defendants or any of them any *mesne* profits in this action : nor can he recover in this action for occupation by the defendants, or any of them before the action was brought, as was contended for by his counsel.

I think the foregoing determines all that I am called upon to decide.

G. A. B.

[CHANCERY DIVISION.]

MCGUGAN V. SCHOOL BOARD OF SOUTHWOLD,
SECTION NO. 7.

Public schools—Change of school site—Meeting of ratepayers—Public School Act—Form of resolution—Compound resolution—R. S. O., 1887, ch. 225, secs. 32, 64.

Where it appeared that at a meeting of ratepayers, called, pursuant to sec. 64 of R. S. O., 1887, ch. 225, to provide for a change of the school-site, a resolution for that purpose, and also an amendment thereto, were submitted, both of which, in addition to the main question as to change of site, embraced matters collateral thereto, the former of which was carried.

Held, that the resolution was invalid, and that certain deeds of conveyance, executed pursuant thereto, must be set aside.

It is essential that the vital matter voted on should be so laid before the meeting that a fair vote thereon can be given, unequivocally indicating the mind of the majority on the particular point.

Held, however, that as the plaintiffs were present at the meeting, and it was their business to have then objected to the way in which the question was being submitted, and complained to the inspector under sec. 32 of the said Act, they should not have their costs of action.

Statement.

THIS was an action brought by one of the board of public school trustees for school section No. 7, of the township of Southwold, and certain of the ratepayers of the section, against the school board of the section, and the other two trustees, for the purpose of setting aside a deed of exchange of the old school site for a new school site, upon the ground that the resolution in favour of the change of school site had not been properly and regularly passed under the provisions of the Public Schools Act.

The circumstances of the case are sufficiently set out in the judgment.

The action came on for trial at St. Thomas, before BOYD, C., upon May 2nd, 1889.

Meredith, Q. C., and *Crothers*, for the plaintiff, cited the various sections of the Public Schools Act, R. S. O. 1887, ch. 225, and *Wallace v. Board of School Trustees of the Township of Lobo*, 11 O. R. 648; *Brice on Ultra Vires* 2nd ed., p. 120.

Doherty, for the individual defendant.

Argument.

Glenn, for the School Board.

May 13th, 1889. BOYD, C. :—

By the provisions of sec. 64 of the Public Schools Act, B. S. O., 1887, ch. 225, no change of school site in rural divisions shall be made without the consent of the majority of the ratepayers of the section at a special meeting called for that purpose. This meeting is to be called by the trustees and organized by appointing a chairman and secretary as provided by the Act, sec. 40, sub-sec. 1, (a), and sec. 17. The chairman shall preside and submit all motions to the meeting in the manner desired by the majority, (sec. 18.) He shall also decide all questions of order subject to an appeal to the meeting, *Ib*. The meeting contemplated by sec. 64, is called to pass upon two matters: first, as to whether there shall be a change of site; and, if so, second, whether the proposed new site is acceptable. It is desirable to have these special matters presented free from all other questions that might divert the attention and distract the vote of the ratepayers. The special meeting is called for a special purpose, and that purpose should be so presented to the ratepayers assembled, that there shall be no peradventure as to what was the thing agreed upon by the majority.

No precautions were taken to secure such a result in this case; rather was the matter so presented that it cannot be said that the ratepayers had a fair opportunity of voting upon the material point. There was a motion of a compound character, and also an amendment of a compound character submitted to the meeting simultaneously, and those present were told to vote for the one or the other. The motion embraced three distinct propositions, and was in this form: that the school section remain as it now stands, (*i. e.*, united with No. 18), and that the house or site be removed to the site chosen by the trustees, and

Judgment.
BOYD, C.

that Mr. Axford be permitted to leave the section if he chooses. The amendment also embraced three propositions, and was in this form: that school section 7 Southwold remain as it was before the union with No. 18, and that the school site stay as it is, and that the school section that was No. 18, enjoy the same privileges of the school as at present. Now, it may well be that considerable latitude should be allowed on such occasions, and that no rules of strict formality need be imposed upon these popular meetings. The general rules to be observed are summarized by Coleridge, J., in *Gosling v. Veley*, 4 H. L. Cas. at p. 763: "If the questions for decision were fairly and intelligibly stated; if every one present desirous of making a proposition has an opportunity of doing so on every question proposed, all has been done in these respects which is necessary." But it is essential that the vital matter voted on should be so laid before the meeting that a fair vote thereon can be given, unequivocally indicating the mind of the majority on that particular point. In this case the question of "change" or "no change of site," was that upon which the vote should have proceeded. There need not have been any amendment to the motion if that had been properly limited; and the amendment, as it is, is no more than a negative of the proposition made, except as to the case of Mr. Axford. But by grouping the motion and amendment with matters collateral to the special purpose of the meeting, and submitting all together, no one can say what the opinion of the majority may have been on the question of "change," pure and simple. By this manner of presentation, a person was unable to vote for or against the change proposed, *per se*, but being obliged to consider *that*, as linked with the other propositions, he was constrained to vote for what appeared to be on the whole the least objectionable or the most desirable combination.

The subsequent action of the ratepayers indicates that the majority do not desire a change of site. They, at meetings called for the purpose, refused to authorize the raising of money for the purpose either of removing the

old house to the proposed new site or of building a new school house thereon.

Judgment.
Boyd, C.

Before any of these meetings, however, the trustees acting, as I think, *bond fide*, had entered into an agreement with the defendant Burdan to sell the old site to him in consideration of \$80, and a deed of the new site. This agreement was consummated by the execution of conveyances on November 30th, before any protest from the plaintiffs was made. Now, these plaintiffs were present at the special meeting called in April to deal with the question of changing the site, and it was their business to have then objected to the way in which the question was being submitted, or have made complaint to the inspector under sec. 32, that the proceedings at the meeting had not been in conformity with the Act. It was said that this section did not apply; on the contrary, I think it expressly provides for the speedy and inexpensive rectification of just such miscarriage as this in the administration of the law with reference to rural public schools. While I set aside the conveyances and declare that there has been no valid resolution to justify a change of site, I do so without costs on account of the inaction of the plaintiffs and their delay to put right what might have been adjusted at the outset with trifling expense.

A. H. F. L.

[CHANCERY DIVISION.]

CORHAM V. KINGSTON.

Mortgage—Insurance money—Application upon mortgage—Application of payments—R. S. O., 1887, ch. 102, sec. 4.

The defendant held a mortgage upon the plaintiff's lands to secure \$300 with interest, to be paid yearly together with an instalment of principal money not less than \$50, the first instalment of principal and interest to fall due on December 16th, 1888. On June 29th, 1888, a fire occurred, and the defendant received \$195, insurance money: without communicating with the plaintiff, he thereupon assumed to apply this as follows: he reckoned the interest up to the receipt of the money, and deducting that credited the balance on the whole sum advanced; and no payment of the first instalment being made by the mortgagor on December 16th, 1888, he proceeded to exercise his power of sale.

Held, on motion for an injunction to restrain the sale, that the rules as to appropriation of payments did not apply, the insurance money not constituting a payment in the ordinary sense of that word, and the mortgagor having had no opportunity of first directing its appropriation.

Held, also, that though the mortgagee had the right as declared by R. S. O., 1887, ch. 102, sec. 4, to apply the insurance money in satisfaction of the money that ought to be paid under the mortgage, it was not competent to him to accelerate the times of payment, or to alter in any respect the terms of the instrument without the consent of the mortgagor. The insurance money must be applied from time to time as payments fell due under the mortgage, unless otherwise arranged between the parties.

Statement.

THIS was a motion on behalf of the plaintiff to restrain Robert Kingston, the defendant, from further prosecuting proceedings commenced by him for the sale of the lands in question, under circumstances which are sufficiently set forth in the judgment.

The motion came on for argument on May 11th, 1889, before BOYD, C.

Hoyles, for the plaintiff. There is no decision on the exact point involved. See, however, *Jones on Mortgages*, 3rd ed., s. 409; *King v. State Mutual Fire Ins. Co.*, 7 Cush. 1. As to the question of appropriation, see *Greenleaf on Evidence*, 10th ed., (Redfield) vol. 2, secs. 531, 531, a.

Marsh, for the defendant. As to the right to apply the insurance money, see 14 Geo. III. ch. 78; 50 Vic. ch. 26,

sec. 154 (O.); R. S. O. 1887, ch. 102, sec. 4, sub-secs. 1, 2; 6 ^{Argument.} C. L. T. p. 558; *Carr v. Fire Assurance Association*, 14 O. R. 487. "Money due under the mortgage," means anything secured by the mortgage: *Ex parte Kemp*, L. R. 9 Ch. 383, 387. The insurance money is part of the proceeds of the security, which accordingly should be reduced: *Austin v. Story*, 10 Gr. 306. The money should be applied, first on the interest, then on the principal of the mortgage debt.

Hoyles, in reply. The statute does not help the mortgagee. It must apply to mortgage money received by the mortgagor. The mortgage in *Austin v. Story*, *supra*, was not an instalment mortgage.

May 13th, 1889. BOYD, C. :—

A new point for decision has arisen in this case as to the application of money for insurance received by a mortgagee. The motion is to restrain the exercise of the power of sale by the defendant in respect of a mortgage held by him on the plaintiff's land. By the terms of the mortgage which is in the statutory short form, the mortgagor is to insure for not less than \$300. This was done, and on November 29th, a loss by fire occurred to the extent of \$200. The mortgage is dated December 16th, 1887, and the first payment of interest is to be made a year thereafter. By the terms of the mortgage it was to be paid by yearly instalments of principal also of not less than \$50, with the privilege to the mortgagor of paying up to \$100 at the time of any yearly payment.

The insurance money was received by the defendant, and a receipt was thereupon endorsed on his mortgage in these words: "Received to-day from Queen Insurance Company the sum of \$195, being on account of within mortgage." There was no communication with the mortgagor as to the disposition or application of this money, and they are now at issue as to how it should be dealt with. The plaintiff submits that it should be applied to satisfy in the first place the instalment and interest which

Judgment.
BOYD, C.

fell due in December, 1888, whereas the defendant says he has reckoned the interest due up to the date of the receipt of the money, and deducting that has credited the balance on the whole sum advanced.

The practical difference is, that as the defendant puts it the mortgagor is in default for non-payment of the first instalment, and as the plaintiff puts it, that and more has been paid by the insurance moneys. The parties might have come together and arranged as to these moneys, but failing this it appears to me that the rules as to appropriation of payment do not apply. The money did not come from the hands of the mortgagor. It was not a payment in the ordinary sense of that word, and he had no opportunity of first directing its application: *Greenwood v. Tasker*, 14 Sim. 522.

The defendant refers to the statute R. S. O. 1887, ch. 102, sec. 4, as justifying his application of the moneys. That may be regarded as declaratory of the law (touching the destination of insurance money as between mortgagor and mortgagee), so far as sub-sec. 2 is concerned.

By sub-section 2, the mortgagee may require that the insurance money be applied in or towards the discharge of the money due under his mortgage. It is argued that "due," as here used, extends to what is not presently payable. I doubt this. "*Due*" is commonly used to indicate to what is payable, and here, as used in connection with the word "*discharge*" means, I take it, "in satisfaction of the money that ought to be paid under the mortgage." I do not read this language as equivalent to "the money secured by the mortgage," but to that which is due and payable by the terms of the instrument. That is to say (as applied to this case) it is not competent for the mortgagee to accelerate the times of payment, or to alter in any respect the terms of the instrument without the consent of the mortgagor; the realization of the insurance money does not change the terms of the security, although the money is to be applied on the mortgage. It is to be applied from time to time as payment falls due, unless it

is otherwise arranged between the parties. No such arrangement having been made here, I think the money must be attributed to the payment and instalment which fell due in December last, and, therefore, I grant the injunction.

Judgment.
Boyd, C.

A. H. F. L.

[CHANCERY DIVISION.

HALL V. FORTYE.

Bankruptcy and insolvency—Assignment to one other than sheriff—Consent of creditors—Subsequent assignment to sheriff.

It is sufficient under R. S. O., 1887, ch. 124, sec. 3, sub-sec. 5, if the consent of creditors to an assignment is given subsequently to the assignment being made, provided that it is given before any assignment is made to the sheriff of the county.

THIS was an action brought by the sheriff of the county of Peterborough, against one Robert H. Fortye, for the delivery up of possession of the estate of Porter Bros., insolvents, under circumstances which, with the arguments of counsel are sufficiently set out in the judgment.

The trial took place at Peterborough on April 26th, 1889, before MACMAHON, J.

*Poussette, Q.C., and Johnston, for the plaintiff.
Watson, and R. E. Wood, for the defendant.*

May 8th, 1889. MACMAHON, J.:—

This action was tried before me at Peterborough on the 26th of April.

On the 27th of February, 1889, Charles Porter the younger and David Porter then carrying on business as carriage makers made an assignment for the general benefit of their creditors to the defendant Robert H. Fortye of

Judgment. Peterborough, who executed the assignment, as did also the firm of Fortye & Phelan, creditors of the insolvents' estate, but the debtors did not prior to making such assignment obtain the consent of a majority of their creditors having claims for \$100 and upwards.

MACMAHON,
J.

Immediately upon the execution of the assignment to him, the defendant gave notice thereof, and called a meeting of the insolvent's creditors for the 15th of March, at which meeting fourteen creditors, having claims of \$100 and upwards, had filed their claims amounting in the aggregate to the sum of \$9,220, and were present or represented; the total of the claims of \$100 and upwards not represented at the meeting being \$685.

At that meeting the appointment of the defendant as assignee, was ratified, and two inspectors were appointed by the creditors who were authorized to deal with the estate as they might think best. And under instructions from the inspectors so appointed, the defendant proceeded to realize the assets of the estate by advertising the sale of the stock, &c.

Subsequently to the 15th of March, the insolvents made a general assignment for the benefit of creditors to the plaintiff who is the sheriff of the county of Peterborough.

The action is for the delivery up of possession of the said estate to the plaintiff, and for damages for intermeddling with the estate after the assignment by the insolvents to the plaintiff, and a demand thereunder of possession from the defendant.

After the assignment by the insolvents to him the plaintiff applied on the 27th of March last to the learned Chancellor for an injunction to restrain the defendant from selling the stock in trade of the insolvents. The motion was refused the Chancellor holding that it was not necessary to have the assignment assented to at the time of the execution, and so long as it received the consent of the creditors before the execution of another assignment it was not void as against a subsequent assignment within sec. 3,

sub-sec. 2 of R. S. O., 1887, ch. 124. (See C. L. T., vol. 9, Judgment, p. 160). (a)

MACMAHON,
J.

I follow the learned Chancellor in holding that it was not essential to the validity of the assignment to the defendant, as against the subsequent assignment to the plaintiff as sheriff of the county, that it should have received the consent of the creditors at the time of its execution, but that such consent if given at any time prior to such subsequent assignment is sufficient to validate it.

The argument before me on behalf of the plaintiff was as to the meaning to be attached to sub-sec. 5 of sec. 3 which is as follows: "The debtor may in the first place with the consent of a majority of his creditors having claims of \$100 and upwards * * make an assignment for the benefit of his creditors to some other person than the sheriff and residing in this Province."

Counsel for the plaintiff urged that the words, "in the first place with the consent of a majority of his creditors," should be construed to mean, that the consent of the requisite majority of his creditors having first been obtained by the debtor, he could make an assignment to some other person in the Province which would not be invalidated by a subsequent assignment in favor of the sheriff.

Until the consent of the majority of the creditors was obtained, the assignment to the defendant would have been imperfect as against the subsequent assignment in favour of the sheriff. But I do not regard sub-sec. 5 as making the consent of a majority of the creditors a condition precedent to the making of such assignment in order to its validity as against a subsequent assignment to the sheriff. It is sufficient if such consent is obtained at any time prior to the assignment by the debtor to the sheriff.

Sub-sections 2 and 5 of section 3, must be read together and in doing so the above is the only construction which I can put on them. See *Anderson v. Glass*, 16 O. R. pp. 595-6, per STREET, J.

(a) The learned Chancellor did not deliver a written judgment on this occasion.

RKP.

Judgment.
MACMAHON,
J.

If this construction is not the proper one, then in a case like the present, although a majority of the creditors had consented to the assignment in favor of the defendant, he would be required to give possession of the estate to the sheriff as subsequent assignee, and after the delivery of the possession of the estate to him, the majority of the creditors could at once, under section 6, annul the assignment in his favour by substituting for the sheriff a person residing in the county where the debtor carried on business.

This is a mode of procedure which would have been barren of any beneficial result either to the estate or to the creditors, and could never have been contemplated by the Legislature.

There will be judgment for the defendant, dismissing the plaintiff's action, with costs.

A. H. F. L.

[COMMON PLEAS DIVISION.]

THE WILBERFORCE EDUCATIONAL INSTITUTE V. HOLDEN.

Corporation—Trustee, removal of—Dealing with trust-funds—Necessity of making Attorney-General party.

In an action by an incorporated educational institute for the removal of one of the trustees, who also acted as secretary, for alleged improper dealing with the corporate funds, judgment was given, but without any finding of wilful misconduct, directing such trustee's removal, on the ground that so much doubt was cast upon his dealings with the trust-funds that it would not be proper to allow him to remain a member of the board.

Such an action is maintainable without making the Attorney-General a party.

THIS was an action tried before Rose, J., without a jury, Statement. at Chatham, at the Spring Assizes of 1887.

The plaintiffs were an institution of learning incorporated by 35 Vic. ch. 113 (O.), as amended by 36 Vic. ch. 155 (O). The defendant was one of the trustees appointed by the plaintiffs' Act of incorporation. The defendant also acted as the plaintiffs' secretary. The defendant, while the plaintiffs' secretary, on the 20th January, 1880, received \$850 under a mortgage to the plaintiffs, and had executed a partial discharge thereof. This money was deposited in the bank to the defendant's credit as secretary, and he claimed to have paid it over to one Chandler the plaintiffs' treasurer, by two cheques for \$350 and \$500, the former of which he alleged was returned by the bank to him, and was subsequently destroyed by fire. This first alleged payment was disputed, and the latter admitted.

At the trial the cheque for \$350 was produced from the custody of the bank, and was shewn to have been drawn by the defendant, payable to his own order, and was marked by him "to be applied on taxes in Essex."

The defendant further claimed that he paid to Chandler, the plaintiffs' treasurer, a sum of \$500 out of a sum of money received, on the 6th of April, 1880, on a sale of some lands of the plaintiffs to one Letourneau, by

Statement. depositing the same in an envelope in the bank for the plaintiffs.

The defendant counter-claimed for compensation for time, trouble, and care, used and expended by him as trustee for the plaintiffs, in managing the affairs of the plaintiffs, and in securing for them certain grants and donations of land and money.

The defendant for several years made no claim for compensation, although his bills for expenses were regularly paid. At one time the plaintiffs passed a resolution to grant him \$260 for compensation on condition of the immediate payment by him of the money alleged to be due from him.

The defendant contended at the trial that the plaintiffs had no right to bring this action, but that it should have been brought by the Attorney-General on the relation of the plaintiffs, or that at any rate the Attorney-General was a necessary party.

Moss, Q. C., and Craddock, for the plaintiff.

Meredith, Q. C., and Rankin, for the defendant.

The learned Judge reserved his decision, and afterwards delivered the following judgment :

June 3, 1887. ROSE, J. :—

This case was heard in April, 1886; and argued at the convenience of counsel in January, 1887. I have been prevented by press of work from considering the evidence and arguments until now.

[The learned Judge then considered the evidence, and came to the conclusion that the defendant had not paid over the amount of the two cheques to the plaintiffs, and disallowed his claim for commission, as there was no agreement, express or implied, for any such allowances for services which are customarily rendered by officers of similar institutions without reward, and continued :]

I think the defendant must be removed from his position as trustee. I do not wish to find wilful misconduct; but it

seems to me that there is so much doubt cast upon his dealings with the trust funds that it would not be proper to allow him to remain on the Board.

Judgment.
Rose, J

My finding against the correctness of the statement on the cheque as to the application of the \$350 for taxes, must, I think, compel me to direct his removal from the Board.

It may be that he has so mixed up his accounts and dealings that he cannot now clearly state what disposition he did make of the money; but his position is too equivocal to permit confidence to be reposed in him as a trustee.

Mr. Meredith, at the trial, demurred *ore tenus*, on the ground, as he said, that the Attorney-General was a necessary party, referring to Daniel's Chancery Pleading and Practice, 4th ed., p. 138; Tudor on Charitable Trusts, 2nd ed., pp. 154, 161, 2; *Boulton v. Church Society of the Diocese of Toronto*, 15 Gr. 450; *McMurray v. Northern R. W. Co.*, 22 Gr. 476; *Trustees of the Franklin Church v. Maguire*, 23 Gr. 105; Lewin on Trusts, 8th ed., pp. 846-927; Boyle on Charities, p. 38.

I am of the opinion that this objection is not tenable.

There must be judgment for the plaintiffs directing the removal of the defendant from the Board, payment of \$342.10, and cost of suit.

[CHANCERY DIVISION.]

THE TORONTO GENERAL TRUSTS COMPANY V. SEWELL.

Life insurance—Policy effected before marriage—Endorsement in Ontario in favour of wife after marriage—Policy issued out of this Province—Law governing endorsement—Creditors—Administrator—R. S. O., ch. 136.

The husband of the defendant, while a bachelor domiciled in this Province, had, in the years 1871 and 1876, effected three policies of insurance on his life with companies whose head offices in Canada were at M., in the Province of Quebec, where the insurance moneys were payable. After his marriage, while still domiciled in this Province, he endorsed declarations on the policies in favour of defendant, and handed them to her. After his death the insurance moneys were claimed by the defendant and by the plaintiffs as administrator of his estate, against which there were creditors.

Held that the endorsements on the policies were governed by the law of this Province.

Lee v. Abdy, 17 Q. B. D. 399, followed.

Held, however, that as defendant's husband was not a "married man" at the time he effected the policies, he could not (not being within the exception provided in 47 Vic. ch. 20, sec. 2) withdraw from the claims of his creditors the benefit of the policies effected before marriage by endorsements or declarations after marriage for the benefit of his wife, and the plaintiffs were entitled to the insurance moneys.

Statement.

THIS was an action brought by the Toronto General Trusts Company against one Clara Ann Sewell, formerly called Clara Ann Bell, the widow of Charles Wallace Bell, deceased, in the judgment mentioned.

The facts are sufficiently set out in the judgment.

The action was tried in Belleville, on March 21st, 1889, before FERGUSON, J.

Marsh, for the plaintiffs. The policies are payable in Montreal, in the province of Quebec, and not within the province of Ontario: *Lebel v. Tucker*, L. R. 3 Q. B. 77; *Bradlaugh v. DeRin*, L. R. 3 C. P., 358. The Ontario statutes have no application to the policies, because they are foreign contracts. To hold that they have would be contrary to general law: *Ruse v. The Mutual Benefit Life Ins. Co.*, 23 N. Y. R. 516; *The Equitable Life Assurance Co. of the U. S. v. Perrault*, 26 L. C. Jur. 382;

Parken v. Royal Exchange Ass. Co., 8 Ct. of Sess. (N. S.), *Argument*. 365, at p. 372; *Shattuck v. Mutual Life Ins. Co. of New York*, 4 Cliff (Cir. Ca.), 598; *Lamb v. Bowser*, 7 Bissell (Cir. Ca.), 315; *Clarke v. Union Fire Ins. Co.*, 6 O. R. 223. The endorsements were not signed, and so were not sufficient: *Mathews v. Warner*, 4 Ves. 197 (a); *Walker v. Walker*, 1 Mer. at pp. 513, 515; *Catlett v. Catlett*, 55 Mo. 330; *Waller v. Waller*, 1 Grattan (Va.) 454; *Caton v. Caton*, L. R. 2 H. L. 127; *Hubert v. Treherne*, 3 M. & G. 743. Sec. 2 of 47 Vic. ch. 20 (O.), shews that a case under sec. 5 of that statute requires the issue of the policy to the insured when he is a married man.

Moss, Q. C., contra, The suit is merely to deal with money paid into Court, and so within the province of Ontario. We are entitled to presume that the law in the province of Quebec is the same as to these policies as in the province of Ontario. Sec. 1 of 47 Vic. ch. 20 (O.), and sec. 6 of 48 Vic. ch. 28 (O.), shew the scope of these statutes. The words "married man," in 47 Vic. ch. 20, sec. 5 (O.), mean a man who had a policy, and at the time of doing the act was a married man. The statute only requires a declaration to be endorsed, and that has been done. The delivery over of the policies shews that Bell did not intend to do any more than endorse the declarations. There was no necessity for any signature: *Proper v. Parker*, 1 R. & M. 625; *Bleakley v. Smith*, 11 Sim. 150; *Lobb v. Stanley*, 5 Q. B. 574; *Johnson v. Dodson*, 2 M. & W. 653; *Re King—Sewell v. King*, 14 Ch. D., 179; *Porter's Law of Insurance*, 310; *Crawley's Law of Life Insurance*, 58; *Fortesque v. Barnett*, 3 M. & K. 36

April 2, 1889. FERGUSON, J.:—

The plaintiffs are the administrators with the will annexed, of the estate and effects of the late Charles Wallace Bell.

The defendant was the widow of the said Mr. Bell, who, before his marriage with her, had effected three

Judgment. policies of insurance upon his life; one in the year 1871, FERGUSON, J. and each of the other two in the year 1876.

Mr. Bell died in August, 1884. In the spring, or early part of that year, he made an endorsement (that is, assuming it have been well made) upon each of these policies in favor of his then wife the defendant. Mr. Bell always, as I understand, had his residence at Belleville in this province, and these endorsements were made there.

The head offices of each of the insurance companies, so far as business in Canada is concerned, was at the time of the issuing of the respective policies, and still is, at Montreal, in the province of Quebec, the real head office being in Great Britain, as I understand. Each of the companies was, at the time of the issue of its policy to Mr. Bell, carrying on business in Ontario, through numerous agents soliciting applications, receiving and forwarding premiums, &c., and practically making the transactions with the applicants for policies, excepting that each such transaction had to be approved of at the head office in Montreal, and the losses were paid by check or draft issued at the same office in Montreal. The transactions for these policies, were in this way made by Mr. Bell with the respective agents at Belleville.

The endorsement made upon one of the policies is in the words following:

"Know all men by these presents, that I, Charles Wallace Bell, the party assured in and by the within policy, do hereby pursuant to the provisions of the statute in that behalf, declare that the within policy, and all advantages to arise therefrom, shall be and accrue for the benefit of my wife Clara Ann Bell."

"Signed, sealed, and delivered in the presence of."

Another of the endorsements is in the same words, down to the name "Clara Ann Bell;" and then follows this: "Witness my hand this 12th day of February, 1884."

"Signed, sealed, in presence of."

The other of the endorsements is in the same words, down to the same name "Clara Ann Bell," and then fol-

lows this: "Witness my hand, this 12th day of February, 1884."

Judgment.
FERGUSON, J.

"Signed, sealed, and delivered in presence of."

These endorsements are all in the handwriting of the late Mr. Bell, but none of them is signed by him or by any witness.

After the death of the late Mr. Bell, these policies were in the possession of the defendant, and she very naturally claimed payment from the respective companies. It appears—it was proved at the trial—and not in fact disputed, that there are creditors of the late Mr. Bell unpaid, and who would be entitled amongst them to receive in satisfaction of their claims against his estate the whole of these insurance moneys, if the moneys belonged to his estate, the estate being insufficient to pay the liabilities of Mr. Bell, who, it appears, before his death, had visited the province of Manitoba, during, at, or about the time called the period of the "boom" in that country.

The plaintiffs, as such administrators, as aforesaid, also naturally enough claimed these insurance moneys. An order was made for the delivery of the policies by the defendant to the plaintiffs. This was done. The money was paid, and paid into Court where it now is. The total amount is said to be \$3,330.11, and the accrued interest \$387.46.

There being the two claimants of the money, this issue was ordered to be tried, and it came on for trial before me at the city of Belleville. The form of the issue is: "The plaintiffs affirm, and the defendant denies, that the plaintiffs are, as against the defendant, entitled to the moneys." A contention on behalf of the plaintiffs was, that even assuming that the endorsements, in the handwriting of Mr. Bell upon the policies, were free from any objections as endorsements under the statute, yet they had and have no application in this case, and are or would be of no effect in favor of the defendant, because, as was said, the policies are foreign contracts, being in the view of the law made and the loss if any payable, in the city of Montreal, in the

Judgment.
FERGUSON, J. province of Quebec, and if the defendant had to bring her action for the money in that province, or indeed elsewhere, she would be met by the objection, that the endorsements, or assignments, through which she could only claim, were such, that they could not be recognized by the law of the place where the contract was made, and was to be paid or satisfied, as she did not shew that there existed in the province of Quebec any statute or law similar to the statute of this province respecting such endorsements upon policies of insurance.

I need not, I think, here discuss the question as to what the presumption on the subject would, in the absence of any evidence respecting the foreign law, be, as I think the contention is, for reasons apart from this, untenable, and must fail.

Amongst the authorities referred to in support of this contention was the case *Lebel v. Tucker*, L. R. 3 Q. B. 77, and there is the case *Bradlaugh v. De Rin*, L. R. 3 C. P. 538, which appears to be the counterpart of that case. Both cases were regarding the endorsements or transfers of commercial paper, negotiable instruments, in a country foreign to the place where the paper was made and payable. Both these cases were referred to and discussed in the subsequent case, *Lee v. Abdy*, 17 Q. B. D. 309, the headnote of which is: "The plaintiff sued the trustees of an English life insurance company as assignee of a policy of life insurance granted by such company. The assignment of the policy was made in Cape Colony, and at the time of such assignment the assured, the assignor, was, and he remained till his death, domiciled in Cape Colony, and the plaintiff was his wife. By the law of that colony such an assignment was void by reason of the alleged assignee being the wife of the assignor: *Held*, that the law of Cape Colony applied to the assignment of the policy, and therefore that the defendants were entitled to judgment."

I insert the headnote here because I do not think that I can state the case more briefly. It appears to me that the case and the reasoning of the learned Judges, and especially

that of Mr. Justice Wills, at p. 314, apply in the present Judgment. case. I think the case an authority conclusive against the FERGUSON, J. contention of the plaintiffs, and I do not see that it has been appealed from or overruled.

There is also another late case (referred to by Mr. Moss) which, seeing that the company have paid the money, which is now in Court, seems to have an application also against the contention. This case is: *Re Turcan*, 40 Ch. D. 5; see the last part of the reasoning of Cotton, L. J.

My conclusion is against the plaintiffs on this contention, and I cannot but think that it would be a surprise to most people, to be told that they could not properly make endorsements upon policies under the provisions of our statutes, merely because the policies were issued in Montreal by companies having their Canadian head offices there. See also Porter's Law of Insurance, 310, 311.

Another contention of the plaintiffs was, that as Mr. Bell was not a "married man" at the time that he effected the policies in question, he could not under the provisions of the Act, make a valid endorsement, or rather valid endorsements upon them, having the effect contended for by the defendant. The marriage of Mr. Bell with the defendant, took place in February, 1881. The policies had all been effected before that date. There was no evidence as to whether he had been married before, or whether or not he was a married man at the time the policies were effected, and in the absence of any evidence on the subject, the presumption, I think, is, that he was not. I think the burden was upon the defendant of showing that Mr. Bell was a married man when he effected the policies, if such was the fact.

Counsel agreed in saying that the statutes that are to be looked at upon this subject, are 47 Vic. ch. 20. (O) and 48 Vic. ch. 28, (O.)

The fifth section of the former of these Acts, provides that, in case a policy of insurance, effected by a *married man*, on his life, is expressed upon the face of it, to be for the benefit of his wife, or of his wife and children, or any

Judgment. of them or in case he has heretofore indorsed, or may here-
FERGUSON, J. after indorse, or by any writing identifying the policy by
its number or otherwise, has made or may hereafter make
a declaration that the policy is for the benefit of his wife,
or of his wife and children, or any of them, such policy
shall enure, and be deemed a trust for the benefit of his
wife for her separate use, and of his children, or any of
them, according to the intent so expressed or declared," &c.

This contention is, that because Mr. Bell was not a married man when these policies were effected, this section cannot and does not authorize the endorsement upon the policies.

The opposing contention is, that the real meaning is, that the indorsement may properly be made by a man who is a *married man* at the time he made the endorsement, although not a married man at the time of the effecting of the policy.

I am not aware of any decided case upon the subject—the point—nor was any referred to. I have, as best I have been able, examined the statutes on the subject of insurances for the benefit of wives and children, from 28 Vic. ch. 17, to the present time, and I am of the opinion that the endorsement cannot be properly and effectively made under the provision of the Act unless the policy has been effected by the assured when he is a married man.

The first section of the Act last above mentioned, authorized insurances to be effected for the benefit of the wife, or wife and children of the assured. The third section authorized the endorsement or declaration for the benefit of the wife, or wife and children, upon any policy which might have been effected by the assured before the passing of the Act. This would seem to have included policies effected before the marriage of the husband, the assured, but only one year after the passing of the Act was given for doing this, and this is what is referred to in the second section of 47 Vic. ch. 20 (O.), the Legislature making it clear that the provision in sec. 3 of 29 Vic. ch. 17, did so apply.

The substance of what is contained in section 5 now

under consideration was, I think, first enacted by section Judgment.
4 of the Married Woman's Property Act, 1872, and its first Ferguson, J.
appearing in a statute on that subject, is to me somewhat
significant.

The provision in section 3 of 47 Vic. ch. 20, (O.) that any person may insure his life for the whole term thereof, or for any definite period, for the benefit of his wife, or of his wife and children, presupposes that this person is a married man: it would be impossible so to do if he were not.

The expression, "effected by a married man," in the first line of section 5 of 47 Vic. ch. 20 (O.), is used in the 4th section of the Married Woman's Property Act, 1872, and in the R. S. O. 1877, ch. 129, sec. 16. The Legislature seems to have used the expression over and over again, and there cannot, I think, be any doubt as to its grammatical meaning.

The policy of the legislation seems to me to have been to authorize insurance upon his life by a married man in favor of his wife, or wife and children, so that the insurance money should be free from the claims of his creditors, and to authorize endorsements upon, or declarations respecting policies effected by married men so as to have the like effect. The only exception that I see to this is the provision contained in section 3 of 29 Vic. ch. 17, in which the words, "any policy of insurance on his life, which may have been effected and issued before the passing of this Act," are used, and this gives only one year after the passing of the Act to make the endorsement or declaration. The fact of the passing of what is contained in section 2 of 47 Vic. ch. 20, (O.), argues also that some doubt was entertained as to whether section 3 of 29 Vic. ch. 17, did embrace or comprehend policies effected by a man before his marriage.

It was contended that the 1st section of 47 Vic. ch. 20, (O.), and the 6th section of 48 Vic. ch. 28, (O.), indicate or show that policies, in the position of the ones in question here, are comprehended in the words of section 5 of 47

Judgment. Vic. ch. 20, (O.), but I do not see this is so. The provisions
FERGUSON, J. of the Act apply to every lawful contract of insurance at the passing of the Act in force or thereafter effected, &c., the meaning of which is, I think, that the provisions of the Act as they read, and as they are, so apply, which does not extend or change in any degree the meaning of the words of section 5.

I do not see that the legislation shows that the Legislature ever intended—with the one exception that I have referred to—to permit or authorize a man to withdraw from all claims of his creditors, the benefit of a policy of insurance which he had upon his life before his marriage, by an endorsement or declaration after marriage, in favor and for the benefit of his wife or of his wife and children.

The language employed in this section 5 is, I think, plain, and I do not see that its meaning is controlled by any other section, and for these reasons I am of the opinion, that even if the endorsements made by the late Mr. Bell upon these policies had been made in the most formal and complete manner, the effect would not and could not have been that this insurance money would go to the defendant, and be out of the reach of his creditors. And being of this opinion, I do not see that it is necessary that I should decide as to the only other matter of contention, namely, whether or not the unsigned endorsements made by the late Mr. Bell in his own handwriting in form and condition in which they appear to be, are under the circumstances, and what is shewn by the evidence so far as admissible, such as should be considered in themselves sufficient endorsements if the other objections in defendant's way did not exist. I am of the opinion that the plaintiffs, the company, should succeed upon the issue, and my finding and the judgment is for them, the plaintiffs in the issue.

As this is an issue directed in, and in a way a creature of an action pending in the Court, I do not know that I have any power over the matter of costs. I nevertheless

suggest that the costs of both parties be paid out of the Judgment. estate as the late Mr. Bell left this item of his estate in a Ferguson, J. position to invite, as it were, litigation, and no doubt the defendant honestly thought herself entitled, as she contends.

G. A. B.

[QUEEN'S BENCH DIVISION.]

RE M'CALLUM AND BOARD OF PUBLIC SCHOOL TRUSTEES
OF SECTION 6, TOWNSHIP OF BRANT.

Public schools—Suspension of pupil—Mandamus to trustees—Discretion—Delay—Change of position.

A pupil at a public school having injured the top of a school desk by cutting it, he was ordered by the schoolmaster to replace the top with his own hands, and was suspended till he should do so. The suspension was on the 20th February, 1888, and on the 7th of May, 1889, notice of motion was served by the father of the pupil for a mandamus to compel the trustees to re-admit the son. In the meantime appeals had been made by the father to three of the trustees,* to the Public School Board, and to the annual school meeting, on all of which applications the action of the teacher was sustained. During this time the pupil attended another public school.

Held, that the discretion exercised by the master and trustees should not be interfered with, especially after the delay and change in the position of affairs.

THIS was an application by the father of a pupil at a public school, for a mandamus to compel the teacher to receive him back to the school, he having been suspended by the teacher until he should, with his own hands, put a new top on a school desk, which he had injured by cutting.

The facts appear in the judgment.

The application was argued in Chambers before ROSE, J., on the 31st May, 1889.

W. H. Blake, for the applicant.

Aylesworth, for the trustees.

Judgment. June 1, 1889. ROSE, J. :—

ROSE, J.

I ought not to interfere unless I come to the conclusion that no discretion rested in the master or trustees, and that no official judgment was required or permitted: High on *Extraordinary Legal Remedies*, 2nd ed., p. 26, cited in *Re Massey Manufacturing Co.*, 11 O. R., at p. 463.

I must reach the conclusion that the action of the master and trustees in denying the right of attendance at school, was illegal: *McIntyre v. School Trustees of Blanchard*, 11 O. R. at p. 443.

If it was a matter of discretion, although in my judgment the act was unwise, I should not substitute my discretion for that of the officer to whom the decision has been left by law.

So far as the facts appear, I think it was not wise to order the pupil to replace the top of the desk with his own hands, and to suspend him until it was done. Such punishment was, to say the least, fanciful, and almost certain to provoke irritation. And this seems to me the more clear when the regulations provide that for "cutting, marring, destroying, or defacing any part of the school property," power was given to suspend for one month, or until such suspension was removed on assurance of better conduct, or by order of the board of trustees; and further, that "any school property or furniture injured or destroyed by a pupil shall be made good forthwith by the parent or guardian under penalty of the suspension of the delinquent."

The regulations having thus provided for such a case, it was, in my judgment, quite unwise to depart from them and order something not thereby contemplated.

It may be that the irritation of the boy's father caused him to assume an attitude which rendered it difficult to recede from the position at first taken. According to the affidavit of the teacher an offer was made at the school board meeting by him, the teacher, to assist the boy in replacing the top of the desk. As a piece of planed board of the proper dimensions could have been procured without

much difficulty, this offer might well have been accepted as a compromise.

Judgment.
ROSE, J.

But there are other difficulties in the way of the applicant.

The suspension was on the 20th of February, 1888, and this application was not made until the 7th of May, instant, when notice of motion was served. In the meantime appeals were made by the father to three of the trustees, the public school board, and to the annual school meeting, on all of which applications the action of the teacher was sustained.

During this time the lad was sent to a school in an adjoining section, about a mile farther away.

This delay and change in the position of affairs would make it very difficult to interfere, even if I had the power.

The feeling created apparently is such that it would not be at all pleasant for the teacher and the lad to be in the same school, and I would have to consider whether it would be a wise exercise of discretion to require the lad to be readmitted when the probable result would be to break down the authority of the teacher, and it may be, put an end to his occupancy of his office.

I am told that in *Re Yuill*, an unreported case, similar in principle to this case, the Chief Justice of the Queen's Bench Division, on the 27th of April, 1888, held that an application for mandamus would not lie to correct a supposed error of teacher or trustee in a matter of discipline, and that such an application was practically an appeal from the decision of the teacher and trustees.

The motion must be refused with costs.

[CHANCERY DIVISION.]

RE HEWISH.

Partition—Decree for partition and sale—Vesting order—Married women not made parties—Inchoate rights of dower—R. S. O. c. 44, s. 53, sub-s. 10—Conveyancing Act—Mortgage—Equitable dower—Barring dower.

On a vendor and purchaser application it appeared that in 1877 a decree was made for partition or sale of the lands in question, to which four married men were parties, whose wives, however, were not made parties, either originally or in the Master's office, and the lands were sold pursuant to the decree, and a vesting order granted to the purchaser, under whom the present vendor claimed title.

Held, that, notwithstanding the Conveyancing Act, R. S. O. 1887, c. 44, s. 53, subs. 10, the inchoate right of dower of the wives was not affected by the proceedings.

Re Hall-Dare's Contract, 21 Ch. D. 41, considered.

In the case of two of the wives, their husbands had, prior to the partition proceedings, mortgaged the lands, the wives joining to bar their dower.

Held, that these two no longer had any right of dower.

In *Re Croskerry*, 16 O. R. 207, 209, referred to.

THIS was a vendor and purchaser application.

Statement.

The petitioner had contracted to sell certain lands to the Board of Trustees of the Parkdale High School, who, however, objected that there were certain rights of dower outstanding under the following circumstances :

It appeared that prior to June 26th, 1878, James Hawkins, Arthur Hawkins, Dennis Hawkins, and John Joseph Hawkins, all of them being married men, were entitled to the lands in question as tenants in common; that on January 31st, 1877, a decree for partition or sale of the lands was made in a certain suit wherein these four men were plaintiffs, but to which their wives were not made parties either originally or in the Master's office. By his report, dated December 20th, 1877, the Master found that certain persons were entitled to share in the lands, among whom, however, no mention was made of the plaintiffs' wives; and under his direction the lands were sold, and the purchase money paid into Court; and on June 26th, 1878, a vesting order was made in the suit whereby the lands were vested for all the estate and interest of the parties to the suit in M. McConnell, through whom the present petitioner traced his title.

It further appeared that prior to June 26th, 1878, the ^{Statement.} date of the vesting order, J. J. Hawkins had mortgaged all his estate and interest in the lands, his wife joining to bar her dower ; and that in like manner prior to that date Arthur Hawkins had mortgaged his interest, his wife also joining to bar dower ; that these two mortgages were upon that day outstanding and undischarged.

Under these circumstances the purchasers objected, and the petitioner, the vendor, denied, that the wives of the four plaintiffs in the partition and sale proceedings, were entitled to dower, or would be upon the decease of their respective husbands.

The petition came on for argument on May 22nd, 1889, before BOYD, C.

E. D. Armour and Hull, for the vendor. We contend that the Conveyancing Act of 1886, cures the defect : R.S.O. 1887, ch. 44, s. 53, sub-sec. 10. (a) Sub-sec. 2 of the original Act of 1886, 49 Vic. ch. 20, (O.) sec. 20, makes it retrospective ; and though this sub-sec. does not appear in the R. S. O. of 1887, ch. 44, the schedule A. shews it is not repealed. In *Re Hall-Dare's Contract*, 21 Ch. D. 41, a similar point arose. The decree in the partition proceedings in this case was in 1877. The land was sold, not partitioned. The decree for sale amounted to a judgment in rem ; it was a decree for a sale of the land, not merely of the interests of the parties in the land.—[BOYD, C.—Can you sell one man's land under a judgment against another ?]—Yes. *Re Hall-Dare's Contract*, *supra*, shews that though a person whose interest is being dealt with, is not before the Court, the purchaser is not bound to enquire as to this ; and if he does enquire, nevertheless he will have to take the land. As to two of the parties in question,

(a) R. S. O. 1887, c. 44, s. 53, subs. 10, is as follows :—"An order of the Court, under any statutory or other jurisdiction, shall not, as against a purchaser, whether with or without notice, be invalidated on the ground of want of jurisdiction, or of want of any concurrence, consent, notice, or service."

—REP.

Argument. they had mortgaged their shares, and the wives had joined barring their dower; and under the law at that time, there was no dower unless the husband died beneficially entitled. In their case, then, we say there was no dower. The mortgages were paid out of the purchase money. The Dower Act, 1879, 42 Vic. ch. 22, (O.), had not been passed, and it is not retrospective: *Martindale v. Clarkson*, 6 A. R. 1. See *Re Robertson*, *Robertson v. Robertson*, 25 Gr. 276, 486; *Fleury v. Pringle*, 26 Gr. 67; *Black v. Fountain*, 23 Gr. 174; *Beavis v. Maguire*, 7 A. R. 704, 713. The cases are referred to in *Re Croskerry*, 16 O. R. 207, a decision under the Dower Act, 1879.

Hall, on the same side. Sec. 8 of the Partition Act R. S. O., 1887, ch. 104, shews that in any event the land is sold, and not merely the interest of the parties before the Court, and any parties not before the Court, are to resort to the fund: *Weaver v. Gregg*, 6 Oh. 547—[BOYD, C. There is no fund here. Its all gone to the wind, is it not?]

BOYD, C.—

I do not think the Conveyancing Act, R. S. O. 1877, ch. 44, sec. 53, sub-sec. 10, can be held to cut out the interest of the two whose shares have not been mortgaged. I will hear you, Mr. Macdonald, however, as to the other two. I do not think I need apply *Re Hall-Dare's Case*, 21 Ch. D. 41, by analogy in such a way as to produce what appears to be an injustice.

Macdonald, Q. C., for the purchasers. *In re Croskerry*, 16 O. R. 207, your Lordship referring to *Fleury v. Pringle*, 26 Gr. 67, says it has been overruled by the Legislature in the Dower Act, 1879, and that the law as laid down in *Forrest v. Laycock*, 18 Gr. 611, has been thereby promulgated, (p. 209.) If the law in *Forrest v. Laycock*, *supra*, is promulgated, then the wife would be entitled to dower. I submit no title has been shewn to this land, and the application should be dismissed.

BOYD, C.—

Judgment.BOYD, C.

Having regard to the date of the marriages, I think dower does not exist as to the two whose estates were mortgaged. Petition dismissed without costs.

A. H. F. L.

[COMMON PLEAS DIVISION.]

REGINA V. ALEXANDER.

Canada Temperance Act—Adjournment at close of evidence to consider judgment—Not restricted to one week—Commission of offence—Not necessary to allege by servant or agent—Lease—Proof of.

Where at the conclusion of the evidence, on a charge of selling liquor contrary to the Canada Temperance Act, the magistrate reserves his judgment, for the purpose of reaching a decision or of considering the amount of the penalty, he is not restricted to the one week mentioned in sec. 48 of R. S. C. ch. 178.

Regina v. Hall, 12 P. R. 142, followed.

It is not necessary to charge that the offence was committed through the instrumentality of a clerk, servant, or agent, as the defendant is guilty under section 100 of the Canada Temperance Act, R. S. C. ch. 108, and liable to the penalties imposed, if the offence is committed by himself or anyone within the class of persons above mentioned.

At the trial a lease from defendant to one J. was put in and the execution proved by a witness, of two rooms in defendant's hotel, being where the bar was kept and liquor sold, but neither defendant nor J. appeared as a witness at the trial, and there was no evidence as to its *bona fides*.

Held, that this was a matter for the magistrate and as he had found against it the Court could not interfere.

Statement.

In this case a writ of *certiorari* was obtained to bring up the proceedings; and, during Easter sittings, 1888 *Aylesworth*, for the defendant, obtained an order *nisi* to quash the conviction of the defendant, by the police magistrate of the county of Carleton, for having, on the 9th day of November, 1887, at the village of Stittsville in the said county, unlawfully sold intoxicating liquor contrary to the Canada Temperance Act.

The grounds taken in the order on which the conviction was sought to be quashed were:

1. That during the hearing and trial upon the said information, and before the decision of the case, the police magistrate adjourned the said hearing and trial, for a time longer than one week, contrary to the provisions of the Summary Convictions Act.

2. That by the said conviction the defendant was convicted, for that he did unlawfully sell intoxicating liquor contrary to the Canada Temperance Act: that he was not charged or convicted that he did, by any person, his clerk, servant,

or agent, sell to any one any intoxicating liquor; and there ^{Statement.} is no evidence or pretence that the defendant, personally, by himself, sold any intoxicating liquor to any one.

3. There was no evidence whatever that any intoxicating liquor was sold by the defendant himself, or by any one who was in any way, either the clerk, servant, or agent of the defendant.

The court for the trial of the complaint was held by the police magistrate on the 23rd of November, 1887, when W. Mosgrove appeared as the counsel for the defendant, and pleaded "not guilty" to the charge. The defendant was not present in person; and, in consequence of the witnesses subpoenaed for the prosecution not appearing, warrants were issued for their arrest, and the hearing was adjourned until the 26th of November.

At the sittings of the court on the 26th of November the defendant was not present, but was represented by his counsel, Mr. Mosgrove.

The evidence of the witnesses called for the prosecution was to the effect that they got intoxicating liquor in an hotel owned and occupied by the defendant Alexander; that the liquor was procured in a bar-room in the house; and was paid for to a man named Wm. Johnston, who was behind the bar.

Mr. Mosgrove produced a lease, dated the 24th of October, 1887, by which Alexander leased to Wm. Johnston two rooms of the house in the village of Stittsville, owned by the lessor, and at present occupied by him, with the furniture used and enjoyed in connection with the same, said two rooms being a front and back room on the lower flat next the track of the Canadian Pacific Railway for one month at a weekly rent of \$12. These were the rooms where the liquor was sold and the bar kept.

Mr. Mosgrove was sworn as a witness on the part of the defendant, and proved the execution of the lease, which closed the evidence: the magistrate made a memorandum at the foot of depositions: "Decision reserved until the 10th December, 1887."

Argument. In Michaelmas Sittings, November 30, 1888, *Aylesworth* supported the order.

There was no power, under R. S. C. ch. 178, sec. 218, to adjourn the hearing for more than one week. The statute is imperative. This has been expressly decided by Rose, J., in *Regina v. French*, 13 O. R. 80, and by O'Connor, J., in *Regina v. Collins*, 14 O. R. 613. In *Regina v. Hefferman*, 13 O. R. 616, Robertson, J., held that the adjournment in that case was valid, though for more than a week; but because the adjournment was by consent. There was no consent here. The latter case is, therefore, distinguishable; but in any event the view taken by the other judges is a correct one, and is in accordance with the decisions in similar cases: *Bell v. Lamont*, 7 P. R. 307; *Mitchell v. Mulholland*, 14 U. C. L. J. N. S. 55; *Wheeler v. Gibbs*, 3 S. C. R. 374. The lease to Johnston was *bond fide*. The liquor was sold by Johnston, and there is no liability on the defendant. The defendant is not charged or convicted with having sold through an agent.

Delamere, contra. The adjournment to give judgment does not come within the Act; at all events, the objection was cured by the defendant appearing. The conviction properly charges that the defendant sold the liquor, and it was done through his servant, and is merely a matter of evidence. The lease was clearly an attempt to evade the Act, and the magistrate so thought.

March 8, 1889. MACMAHON, J.—

The Summary Convictions Act, R. S. C. cap. 178, sec. 48, provides that "Before or during the hearing of any information or complaint, the justice may, in his discretion, adjourn the hearing to a certain time and place to be then appointed and stated in the presence and hearing of the party or parties or their respective attorneys or agents then present, but no such adjournment shall be for more than one week."

By sec. 52, "The justice having heard what each party

has to say, and the witnesses and evidence adduced, shall ^{Judgment.} consider the whole matter and unless otherwise provided, ^{MAOMAHON,} determine the same, and convict or make an order upon ^{J.} the defendant, or dismiss the information or complaint, as the case may be "

In the present case "the witnesses and evidence have been adduced" so that the adjournment made by the magistrate was neither before or during the hearing of the information or complaint "but at its conclusion in order to determine the case." And the point raised is not governed by the decision in *Regina v. French*, 13 O. R. 80; *Regina v. Heffernan*, *ib.* 616, and *Regina v. Collins*, 14 O. R. 613, in each of which the adjournment was an adjournment of the hearing.

The magistrate, when he reserves his decision at the conclusion of the evidence for the purpose of reaching a decision, or of considering the amount of the penalty, is not confined to the time mentioned in the 48th section.

Since writing the above I have been referred to *Regina v. Hall*, 12 P. R. 142, in which the view I have stated was acted upon.

As to the second ground. It is not necessary to charge that the selling of the intoxicating liquor was done through the instrumentality of a clerk, servant, or agent, as the defendant is guilty under sec. 100 of the Canada Temperance Act, R. S. C. cap. 106, and liable to the penalties imposed, if the offence is committed by himself, or by any one coming within the class of persons above mentioned: *Regina v. King*, 20 C. P. 246; *Regina v. Campbell*, 8 P. R. 55; Paley on Convictions, 6th ed., 77.

The design of putting in and proving the execution of the lease of the two rooms in the defendant's hotel by Alexander to Johnston was to shew that Johnston, holding the lease of that portion of the premises in which the liquor was sold, and the bar kept, he should not be considered the "clerk, servant or agent of the defendant."

Neither the defendant nor Johnston appeared as witnesses at the trial, so there was no evidence as to the *bona fides* of the lease.

Judgment. "In summary proceedings before a justice of the peace he is substituted for the jury, so far as relates to the conviction, that is, as to finding the party guilty or not guilty;" Burn's Justice of Peace, 30th ed., 1142; *Rex v. Reason*, 6 T. R. 375, and *Rex v. Smith*, 8 T. R. 590.

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J.

It is sufficient to authorize a conviction, that there is such evidence before the magistrate as might, in an action on an indictment be left to a jury; and the Court of Queen's Bench, when the conviction is brought before it, will not examine further to see whether the conclusion drawn by the magistrate be or be not the inevitable conclusion from the evidence: Burn's Justice of the Peace, 30th ed., 1142; *Rex v. Davis*, 6 T. R. 177, 178, and R. S. C. ch. 178, sec. 87.

The motion fails on all the grounds taken, and must be dismissed with costs. The writ of *certiorari* will be superseded.

GALT, C. J., and ROSE, J., concurred.

Judgment accordingly.

[COMMON PLEAS DIVISION.]

REGINA V. HOPE.

Criminal law—Inducing note to be signed by false pretences—Evidence of similar frauds on others—Admissibility.

The defendant was indicted in the first count of the indictment for obtaining from one H. a promissory note with intent to defraud, and in the second count with inducing H. to make the said note with like intent. The evidence shewed that on May 4, 1887, the defendant's agent called on H., and obtained from him an order addressed to defendant to deliver to H., at R. station, thirty bushels of Blue Mountain Improved Seneca Fall Wheat, which H. was to put out on shares, and to pay defendant \$240 when delivered, and to equally divide the produce thereof with the holder of the order, after deducting said amount. On 23rd May defendant called, produced the order, and by false and fraudulent representations as to the quality of the wheat, and his having full control of it, its growth and yielding qualities, and that a note defendant requested him to sign was not negotiable, induced H. to sign the note. Evidence was received, under objection, of similar frauds on others, shewing that defendant was at the time engaged in practicing a series of systematic frauds on the community. The defendant was found guilty and convicted.

Held, on a case reserved, that the conviction should be affirmed on the second count, as the evidence shewed that the note was signed by H. not merely to secure the carrying out of the contract contained in the order, but on the faith of the representations made; and it was immaterial that a note was taken when the order called for cash; and, also, that the evidence objected to was properly receivable.

THIS was a case reserved by His Honor Judge Morgan, Statement.
sitting as Chairman of the General Sessions of the Peace,
for the consideration of the Justices of the Common Pleas
Division.

The defendant was tried at the General Sessions of the
Peace for the county of York, in May, 1888, on an indictment,
of which the following is a copy :

<p>“PROVINCE OF ONTARIO, COUNTY OF YORK, TO WIT :</p>	}	<p>The Jurors of our Lady the Queen upon their oath present that Thomas Hope, on the twenty- third day of May, in the year of our Lord one thousand eight hundred and eighty-seven, at the township of King, in the county of York, unlawfully, fraudulently, and knowingly, by false pretences, did obtain from George Hollingshead a certain valuable security, that is to say, a certain promissory note for two hundred and forty dollars, with intent to defraud.</p>
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And the jurors aforesaid, upon their oath aforesaid, do further present
that the said Thomas Hope, on the twenty-third day of May aforesaid, at

Statement. the township of King aforesaid, unlawfully, fraudulently, and knowingly, by false pretences, did cause and induce George Hollingshead to execute and make a certain valuable security, that is to say, a certain promissory note for two hundred and forty dollars, with intent thereby then to defraud the said George Hollingshead."

The evidence is fully set out in the judgment of MACMAHON, J.

The learned County Court Judge left the case to the jury, who found the defendant guilty.

The questions for the consideration of the Court, were :

"1. Was there any evidence upon which the jury could properly convict upon either count of the indictment ?

2. Was the evidence of Ross or Mitchell of other notes being obtained from them by false pretences improperly admitted ?

3. Does the fact that the evidence of Ross or Mitchell as aforesaid was left to the jury, vitiate the verdict ?

If, in the opinion of the Court, there was no proper evidence to go to the jury under the indictment ; or if the second and third questions stated are answered in the affirmative, the conviction is to be quashed ; otherwise to stand.

In Hilary Sittings, February 11, 1889, the case was argued.

Osler, Q.C., for the defendant. There was no fraudulent misrepresentation proved. The note was given merely to carry out the order previously given. If, however, the note was not given for such purpose, then there was not a fulfilment of the contract, and so no fraud. The evidence of Mitchell and Ross was improperly received. The case of *Blake v. Albion Life Ins. Co.*, 4 C. P. D. 94, is relied on by the Crown ; but that case is distinguishable, as the transaction there formed part of a connected system of fraud. See also *Regina v. Holt*, 8 Cox C. C. 411 ; *Regina v. Oddy*, 5 Cox C. C. 210 ; *Regina v. Frudge*, 9 Cox C. C. 430 ; *Regina v. Gibson*, 16 Cox C. C. 181.

Badgerow, County Attorney, for the Crown. There was the clearest evidence of fraud. Ross's evidence shews that there was the clearest fraud practiced. The evidence objected to was properly receivable, as it shewed that this was one of a series of frauds of a like character, which

the defendant was practising on the community : *Russell* on Crimes, 5th ed., vol. iii., 372-5 ; *Roscoe* Crim. Ev. (10th ed.); 92, 100, 101, 520; *Clarke's* Magistrates' Man., 2nd ed. 128-30, *Regina v. Francis*, L. R. 2 C. C. 128 ; *Regina v. McDonald*, 10 O. R. 553; *Regina v. Bent*, 10 O. R. 557. Argument.

March 8, 1889. MACMAHON, J.:—

The whole of the evidence taken at the trial was put in and formed part of the reserved case, but references thereto, and extracts therefrom, is all that is necessary in order to shew the case made against the defendant at the trial, and to shew the grounds upon which the opinion of the Judges is sought.

On the 4th of May, 1887, an agent of the defendant called upon the prosecutor, a farmer residing in the township of King, in the county of York, and obtained from him an order partly printed on a card, of which the following is a copy :

“This order is negotiable.”

Agents are not allowed to vary it.

To T. HOPE.

NOBLETON, ONT., May 4, 1887.

Deliver to me by freight, at King station, 30 bushels of Blue Mountain Improved Seneca Fall Wheat, which I agree to put out on shares. I further agree to pay you two hundred and forty dollars when delivered ; and it is further agreed that all wheat delivered to George Hollingshead in 1887, shall be equally divided with the holder of this order after deducting the said amount.

(Signed) GEO. HOLLINGSHEAD.

Hollingshead said in his evidence that before Hope called on him he had ordered the thirty bushels of wheat, which must have been when he signed the order. Yet it is singular there is no evidence on behalf of the Crown as to what representations (if any) were made by the agent of Hope to him regarding the wheat, upon the strength of which the order was given.

In fact the case made against the defendant at the trial appeared to have been dissociated from the giving of the

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order by the prosecutor for the wheat, except in so far as to shew that prior to Hope's going to see the prosecutor the latter had given an order for the thirty bushels of wheat

The order, set out above, calls for "Blue Mountain Improved Seneca Fall Wheat."

The evidence of Hollingshead as to what took place between himself and Hope in relation to the wheat on May 23rd, the day the note was given, is as follows :

"In May, 1887, I lived in the township of King. I am a farmer. I had some transactions with defendant, he came to see me about closing business about wheat. He said his agent had been round taking orders, and I think he produced an order I had given. Exhibit 1 was produced by him ; it was signed by me. He produced a number of other orders signed by other persons. We talked about the card Exhibit 1. He said the wheat mentioned was a new kind of wheat. He also produced to me exhibits 2, 3, 4, 5, 6 ; the agent gave me this 7, 8, 9. He said I was to receive thirty bushels of wheat at King station. I was to go after it and put it out on shares with the persons named on cards who were to sow, reap, thresh, and return to me half product. I was to keep six bushels, and have the whole product myself, but half the product which the farmers returned to me I was to keep for Hope, and he was to call for it in the fall of 1888. He said it was Improved Blue Mountain Seneca Fall Wheat. He said he had the whole control of it ; no other person in Canada having any control of it but himself. It was grown on the Blue Mountains, Collingwood, and yielded from forty to sixty bushels per acre. He was a good talker. I believed what he said. At the time Hope was here he said the wheat was at King station ; he shewed me the shipping bill. I went to the station and got the wheat. The card (exhibit 10) was on one of the bags of wheat. Before I got the wheat Hope asked me to sign a paper as security for the wheat. He said if I died he had nothing to shew, and my executors might kick him off the place. He said it was a note, but not a negotiable note, and no money was to be paid on it. It was payable at the Express Office, and would be held by him and put in the Express Office and kept there until he got his share of the wheat, when it would be brought back and returned to me. Exhibit 11 is the paper signed by me. The words "or bearer," were not visible to me on the note when I signed it. I looked at the note. The representations upon which I signed the note, are as follows : 1st. That it was a new kind of fall wheat called Blue Mountain Seneca Fall Wheat. 2nd. He had full control of it, and no one else had. 3rd. That he had grown it several years, and it had turned out forty to fifty bushels to the acre, and had a lot of it then grown. 4th. That the note was not negotiable. I sowed the wheat last fall ; it did not grow except a spear here and there."

On cross-examination, he said :

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"I know I gave a note. I was not to pay any money on it, or to pay it out of the wheat. I don't think I signed the card shewed to me. I did not sign anything but the note. The note was signed by me on a board on back of defendant's buggy. He took the form out of his pocket and filled it up in my presence. I read it over and signed it. * * Defendant figured it to me at thirty bushels to the acre. He multiplied 30 by 30 equal 900, and the half of that 450 at \$1 per bushel, \$450. He said the wheat might be sold at \$5 per bushel, but would only figure at \$1 for the product.

It (the wheat) had been shipped to Hope's order, and he transferred the shipping bill to me when I gave him my note. I would not have given my note if he had not said he had control of it. He said this kind of wheat was grown in several counties, and the particular kind of wheat I was to get had been grown in Simcoe near the Blue Mountains."

Re-examined:

"I was in error when I said defendant told me wheat was grown in County of Simcoe. He said it was grown near the Blue Mountains."

The wheat supplied to Hollingshead was purchased by Hope from Brown, a seedsman at Barrie, and shipped by him to Hope at King station.

Brown said :

"The wheat was known as Improved Seneca Wheat, and was a new wheat, but a good many farmers had it. He (Hope) told me to have it extra clean as it was for seed. It was grown near Barrie. He gave me one dollar a bushel for it."

Elisha Farr said he :

"Got two bushels of this wheat from Hollingshead ; thought it was common Seneca wheat, such as he had grown for four years. He judged the wheat had been heated ; it did not grow. The agent said it was Improved Blue Mountain Seneca Wheat.

Johnson Redmond, said :

"I got some of the wheat from Hollingshead. I believe it was the common Seneca wheat. Have known Seneca wheat for twelve years."

John Watkins, said :

"I have known Seneca wheat for some years. It seemed to be a somewhat superior variety of Seneca wheat."

James Ross, sworn :

"Exhibit 18 is my signature. I know the defendant Hope. Saw him in May last. He said he was proprietor of the Improved Blue Mountain Seneca Fall Wheat. It was hybridized wheat from a six-rowed wheat with Seneca wheat. It was grown in Collingwood township, at the foot of

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the Blue Mountains and he shewed me certificates of parties who had grown it, and that it had grown as high as sixty to sixty-three bushels per acre. He said he let it out to farmers in small lots, and they were to grow it and give him half the product. We agreed I was to get thirty bushels of wheat, and he gave me the names of certain farmers who were to take it and grow it, and deliver me half the product, and I was to keep it until the fall of 1888, and deliver it to him. He wanted me to give him a security for \$240 that I would deliver him the wheat. He gave the security to me to sign, and said it was not a negotiable instrument; and I signed it. Exhibit 19 (a card) was signed by me. I did not sign endorsement on the back of the card. I signed a card like this one; but do not remember all its contents. The signature on the face of the card, Exhibit 19, looks like mine. All I was to make out of the matter was the half of what wheat I grew myself, and any that I did not want myself for seed he would take from me at the price he would be able to sell the wheat for in the fall of 1888. I think the defendant shewed me exhibit 19, and introduced himself as the Hope mentioned therein. He said the wheat was at the station, and wanted me to go and get it, but did not say anything about money or settling. After about an hour of talk he produced a paper which he wanted as security, and I signed it. It was for the amount of my order. The false representations were six rowed wheat instead of four. His figuring and statements as to yield, and expectations as to price he would sell at, and that he expected to make about \$600 or \$700; that I was to get \$5 per bushel out of all I wanted to sell him."

Alexander Mitchell, sworn :

"I met the defendant on 13th May, 1887. He came to see me. He produced some cards, orders. He had a shipping bill for certain wheat. He produced to me card (Exhibit 21). He said the Improved Blue Mountain Seneca Wheat had arrived. He said it was of excellent quality. It was grown at the foot of the Blue Mountains in Collingwood or Nottawasaga. He said it was hybridized. He did not say where he got it. I signed the note produced. I first said I would not sign anything. He said, I have got your order for \$240. I denied having given the order. He said wheat was to be left with me, and he wanted security. I was to go to the station and get thirty bushels and give it out to farmers, and they were to give back to me half of product, and I was to keep it until fall, and I was to give him 240 bushels, and the balance was to be divided between me and the agent. He said he had studied law, and he would make me sign it. The note I gave was to be in the Bolton Express Office, and was to be returned to me when I gave up the wheat. (Note exhibit 22 put in.) Exhibit 23 is a tag which was on one of the bags of wheat which I got. I read the note, but had not my glasses, and could not read it easily. Exhibit 24 is not my signature. I signed a card to return 240 bushels of wheat. I signed a note on the defendant's promise that it would be left at the Express Office, Bolton."

Joseph James, sworn :

Judgment

"I was employed by Hope in May, 1887. I went with him to Hollingshead. I saw Hollingshead sign the note in question. Hope read the card, exhibit 17, to Hollingshead, and said he wanted his note. Hollingshead demurred at first, and Hope said he could demand cash. After a while Hollingshead agreed to give his note, and gave it; and Hope said he would cancel the order as it was an negotiable order, and he wrote on the back of the order and signed it, and I saw Hollingshead write on the order after him. They talked about the share; that Hollingshead would have half of the overplus of product after deducting the \$240. Hope said it was the Improved Seneca wheat, and that he was getting it from Barrie, and was the best he could get there. He did not say it was grown near the Blue Mountains. Hope produced some recommendations about the wheat, and read them. Hope said the note would be left at the Express Office. Hollingshead had the note in his hand, and read it two or three times. Nothing was said by Hollingshead about it being a non-negotiable note. I went with Hope to James Ross's. He was in the field, Hope read to Ross, in my presence, card exhibit 19. I saw Hope write on the back of the card, and saw Ross sign it. Hope, when he read the order, told Ross the wheat was at the station, and produced the shipping bill. Ross said he did not know he had signed such an order. After some talk, Ross signed the note, exhibit 25, and I witnessed it, and Hope gave him the shipping bill for the wheat, and told him the wheat came from Collingwood from T. Long & Bros. Was at Mitchell's. He signed the note, and the card on the back in my presence."

The exhibits 1, 2, 3, 4, 5, and 6, which were produced by Hope on the 24th of May, when he saw Hollingshead, were cards signed by farmers in the vicinity of Hollingshead's farm, agreeing to sow the wheat which Hollingshead, under the order given by him, was to put out on shares.

The evidence of Hollingshead as to the representations made by Hope in regard to the wheat which he stated was then at the King station, was before the jury; and it was for them to say whether the representations were made, which Hollingshead stated were made; whether such statements were false and fraudulent within Hope's knowledge; and were made by him for the purpose of inducing Hollingshead to sign the note; and that Hollingshead did sign the note on the strength of the representations so made.

Counsel for Hope urged that as Hollingshead signed the order for the wheat when the agent saw him on the 4th

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of May, and agreed to pay \$240 cash therefor, what was done on the 23rd of May by Hope was merely to secure the carrying out and a completion of the terms of the contract stated in the order.

The agent may have made representations in terms similar to those which it is alleged were made by Hope, and yet Hollingshead may have insisted upon getting the assurance of Hope, the principal, that the representations made by his agent were true, and he may, until such affirmance of their truth by Hope, have refused to pay the agreed price, or to give his note therefor.

Hollingshead stated that the note was made by him on the strength of the statements made by Hope that the wheat was a new kind of wheat known as "The Blue Mountain Improved Seneca Fall Wheat," and believing it to be such new kind, gave his note.

The evidence of Ross, from whom Hope purchased this wheat, shews that Hope was perpetrating a gross fraud upon Hollingshead.

Then as to the question that Hollingshead had agreed to pay cash, and instead of that gave his note which was not a fulfilment of the original contract he entered into, and it was therefore urged there was no fraud: viewing this case, as we think it properly should be viewed from what took place between Hope and Hollingshead on the 23rd of May, the fact of the Hope's getting from the prosecutor a note instead of cash, can make no difference so long as the note was obtained by the fraudulent misrepresentations charged.

The objection taken to the admission of the evidence of Ross and Mitchell, is not tenable.

Hope stated to Ross that he was the proprietor of the "Improved Blue Mountain Seneca Fall Wheat"; and to Mitchell he made a somewhat similar representation. To these parties, in addition to the above, Hope made other representations than those which he made to Hollingshead.

But the question is not whether Ross and Mitchell in giving their notes to Hope relied upon the same representations as were made to Hollingshead, but whether the evidence was receivable for the purpose of shewing that at that time Hope was engaged in practising a series of systematic frauds upon the farming community by representing that the wheat he was inducing them to purchase was a totally different wheat from that which he was supplying to them.

That class of evidence is admissible for the purpose of explaining motives and intention on the part of Hope, and is governed by *Regina v. Francis*, L. R. 2 C. C. 128; *Blake v. Albion Ins. Co.*, 4 C. P. D. 94.

There must be judgment for the Crown on the case reserved, and the conviction affirmed on the second count of the indictment.

Judgment.
MACMAHON,
J.

[COMMON PLEAS DIVISION.]

LENNOX. v WESTNEY.

Landlord and tenant—Agreement for a lease—Possession—Tenancy at Will.

The defendant entered into negotiations with a loan company, who were the owners of a farm, for a lease thereof to him. The terms were discussed, and pending a lease to be prepared by the company's solicitors and executed by defendant, he was allowed to enter into possession. The defendant admitted that until he executed the lease there was no completed agreement. A lease was accordingly prepared, containing what the company understood were the terms, which defendant refused to execute. The company thereupon sold the land to plaintiff and gave defendant notice to quit. In an action by plaintiff to recover possession,

Held, that the plaintiff was entitled to recover; that as the defendant was not in possession under any concluded agreement regarding the lease he was merely in as tenant at will to the loan company, which was determined by the notice to quit.

Statement.

THIS action was brought to recover possession of the southerly part of lot 14, in the 2nd concession of the township of York, containing sixty acres; and for mesne profits of the same from the 25th of December, 1887, until possession should be given by the defendant.

The cause was tried before GALT, C. J., without a jury, at Toronto, at the Winter Assizes of 1889.

The facts shortly were these: The Western Canada Loan Company being the owners of the land in question, the defendant, in November, 1887, desired to lease the same, and on the 12th of that month they wrote him offering to lease the place on certain terms, which he refused to accept, and a few days after he personally opened negotiations with the officers of the Loan Company, when some of the terms as to leasing the land were agreed upon; but the terms of the agreement were to be embodied in a lease to be prepared by the Loan Company's solicitors and forwarded to the defendant for his approval.

What the negotiations were between the Loan Company and the defendant, so far as defendant's understanding of the arrangement was, is given in his evidence at the trial, and was as follows:

"Q. Now, what did you do—did you come to any agreement; did you lease the farm that day? A. We leased the farm that day; he asked me how these terms would suit; I told him they would not suit, not the price and the terms, and there was some little change made; he asked me what I would do; I told him I would give him \$175.00 for 5 years, and in case they made a sale and notified me before the 1st of April, I would give the purchaser the privilege of ploughing in fall. Well, Mr. Watson said, we will try and meet you; we will call it \$175.00 for the first three years, and \$200.00 the next; I offered him \$175.00 for four years, and \$200.00 for the fifth year,—on the same conditions, that I was to have at least a year's notice. The term was to commence the 1st of April; I was to have it 5 years from the 1st of April, *providing there was no sale*. Q. Was there anything else said, A. I asked him if they could draw up a lease that day; they said their solicitors would have to draw up the lease; I asked them if they could draw it up that day; they said it could not be done before 6 o'clock; the day was a good deal like this, raining, and I did not feel like stopping, and I asked them if they could not draw a rough form of lease while they were all there; they said no—their solicitors would draw up the lease, and send the lease for approval; and I asked him if it would be drawn on the usual form of farm lease; they said yes; well, I said, there were things on that I would not subscribe for; they said they would send out the lease for my approval—they would leave all the minor details for me; they did send out a form of lease. Q. Was there anything said about possession? A. No.

HIS LORDSHIP—Did you ever receive a lease. A. I received a draft lease. Q. Did you ever receive a lease executed by the company? A. You mean signed,—no, your lordship.

MR. FRASER—What did they say about the possession,—was there anything said? A. I asked them if they had a key to the property, to the house, and they said no; I said you will buy a lock; they said no, you will have to buy a lock for yourself, but you can move in when you like; I asked them about ploughing, and they said, you can start to plough to-morrow. There was a straw stack on the premises—I told them it had been put up to auction, but had not been sold—I told them I had some young cattle, and they said I could put them on to the place. I started to plough the next day; I went in according to my agreement then. Q. Was there a draft lease sent out to you? A. Yes. Q. When did you receive that? A. Probably about the 19th of November."

The draft lease which the defendant said he received about the 19th of November, was for a term of five years from the 1st of April, 1888, at a rental of \$175 for the first four years, and \$200 for the fifth year. There was a covenant inserted that in the event of a sale of the land by the Loan Company during the currency of the lease, the

Statement. defendant was to deliver up possession to the Loan Company or their assigns before the 1st day of April next following the agreement for sale, and to allow the purchaser to plough the lands after harvest in the year during which any such sale should be agreed upon.

On the 21st of November, the defendant wrote the Loan Company, saying; "Draft lease of above to hand; different in a number of points from agreement between the company and myself. Please let the matter stand until I wait on your company, when I shall have approved lease agreement."

Mr. Fisher, who was at that time in the employment of the Loan Company, and acting for them in the negotiations with the defendant for the lease of the place, and whose evidence was taken under commission at Winnipeg, said, that he gave instructions to the solicitors of the company to draw the lease, and that the lease sent the defendant embodied the agreement entered into between himself as representing the company and the defendant; and that the defendant was permitted by the company to enter into possession of the premises only upon the terms of his executing the lease to be prepared by the company's solicitors.

Upon the return of the lease unexecuted by the defendant the company sold the land to the plaintiff.

The learned Chief Justice found that the defendant was in possession of the premises under an agreement for a lease which entitled him to specific performance as against the plaintiff who purchased with the knowledge that the defendant was in possession; and he therefore gave judgment dismissing the plaintiff's action with costs.

In Hilary Sittings, 1889, *H. J. Scott*, Q. C., moved on notice to set aside the judgment entered for the defendant, and to enter judgment for the plaintiff.

In the same sittings, *H. J. Scott*, Q. C., supported the motion, and referred to *Winn v. Bull*, 7 Ch. D. 29.

R. L. Fraser, contra, referred to *Walsh v. Lonsdale*, Argument.
21 Ch. D. 9.

March 8, 1889. MACMAHON, J.:—

Mr. Fraser, for the defendant, relied upon *Walsh v. Lonsdale*, 21 Ch. D. 9, where it is laid down that since the Judicature Act the rule no longer holds that a person occupying under an existing agreement for a lease is only made tenant from year to year at law by the payment of rent; but that he is to be treated in every Court as holding on the terms of the agreement.

In that case an agreement for a lease of the premises for seven years was executed by the parties, and contained a reference to the covenants, provisoes, &c., which were to be contained in the lease it was stipulated was to be prepared and executed. The lessee entered and paid rent under the agreement.

That case has been approved of in *Re Maughan*, 14 Q. B. D. 956, at p. 958, and *Allhusen v. Brooking*, 26 Ch. D. 559.

In the present case the terms were not arranged, and there was no concluded agreement as in *Walsh v. Lonsdale*.

There was to be a lease prepared by the company's solicitors and sent to the defendant. The lease so prepared and sent contains what the company assert they understood were the terms which were to be contained therein, and that the defendant was allowed to enter into possession upon the understanding that he was to execute a lease containing the covenants and conditions therein embraced. The defendant in his evidence asserts that the lease sent him is not in accordance with his understanding of the terms arranged with the company through Mr. Fisher.

In fact the evidence of the defendant himself states unequivocally that until he assented to the terms of the lease there was no concluded agreement, and never might be one, so that *Walsh v. Lonsdale*, is not an authority by which this case can be governed; but it comes within those

Judgment.
MACMAHON,
J.

principles so clearly enunciated by Lord Westbury in *Chinnock v. Marchioness of Ely*, 4 D. J. & G. p. 546, where he says, at p. 645: "I entirely accept the doctrine * * that if there had been a final agreement, and * * the terms of it are evidenced in a manner to satisfy the Statute of Frauds, the agreement shall be binding, although the parties may have declared that the writing is to serve only as instructions for a formal agreement, or although it may be an express term that a formal agreement shall be prepared and signed by the parties. * * But if to a proposal or offer an assent be given subject to a provision as to a contract, then the stipulation as to the contract is a term of the assent, and there is no agreement independent of that stipulation."

In *Winn v. Bull*, 7 Ch. D. 29, by a written agreement the defendant agreed with the plaintiff to take a lease of a house for a certain term, at a certain rent, "subject to the preparation and approval of a formal contract." No other contract was entered into between the parties; and it was held there was no final agreement of which specific performance could be enforced against the defendant.

Winn v. Bull was followed in *Hawkesworth v. Chaffey*, 54 L. T. N. S. 72.

Counsel for the defendant urged very strenuously that the Loan Company having allowed Westney to enter into possession, there was such part performance as entitled him to have specific performance decreed.

I take it, and the result of the authorities I think is, that in order to entitle a plaintiff to have a specific performance decreed, upon the ground that there was part performance by his being let into possession, the possession obtained must be referable to some agreement the terms of which have been concluded as the basis of a lease between the parties.

The case generally relied upon as supporting part performance of the contract by entering into possession is *Pain v. Coombs*, 1 DeG. & J. 34, where the lessee, by the direction of the lessor, instructed a solicitor, who acted for

both parties, to reduce the terms to writing; and the solicitor prepared a draft contract embodying these and other terms which he submitted to the lessor who afterwards let the lessee into possession, and directed the solicitor to prepare a lease in pursuance of the draft contract; and a draft lease was accordingly prepared to which the lessor objected, and gave the tenant notice to quit. The Court held that there was part performance, and enforced the contract.

Judgment.
MACMAHON,
J.

In that case the defendant had delivered possession of the farm to the plaintiff in January, 1855; and in the following April he entered into an agreement with the plaintiff (which was executed by both) that the defendant (the lessor) was to be allowed to sell a portion of the premises to a railway company, and the plaintiff for a consideration of £475 agreed to give up to the railway company possession of the portion of land which the defendant should sell for the purposes of the railway, shewing, not only that the plaintiff was in possession on the terms of the agreement, but that the defendant, the lessor, was dealing with him in the character of a tenant in possession.

In the present case, according to Mr. Westney's evidence, the negotiations had not been concluded, because he states that he asked if the lease, which the solicitors of the company was to draw, was on the usual form of farm lease. They said, "yes." "Well, I said, there were things on that I would not subscribe for. They said they would send out the lease for my approval." The defendant was not let into possession on any concluded agreement. "The possession was with a view to a tenancy, the terms of where never settled."

The case, therefore, does not bear the analogy which was supposed to exist between it and *Pain v. Coombs*.

The defendant, being in possession with the assent of the Loan Company, but not under any concluded agreement regarding a lease, was tenant at will only, which was determined by the notice of the Loan Company to quit and give up possession.

Judgment.
MACMAHON,
J.

In my view the order must be made absolute to enter judgment for the plaintiff for the possession of the land, and the mesne profits will be the rent agreed to be paid by the defendant as rent for the land. The said amount to be reduced by any payments made by the defendant to the plaintiff on account.

The plaintiff to have full costs of suit against the defendant.

ROSE, J., concurred.

Motion allowed with costs.

[CHANCERY DIVISION.]

'MCNEILL V. HAINES.

Timber—Sale of standing timber—Real property or chattel—Sale of right to cut timber for twenty years—Subsequent sale to another of the same timber during that period—Costs—Superior scale—"Title to land"—Conversion.

Where one sold and assigned to another all the pine timber he might choose to cut for 20 years, with the right to make roads to get to and remove the same, and a covenant that the grantee might, without let or hindrance from any one, cut and remove the timber.

Held (PROUDFOOT J. dissenting), That the timber so sold together with the rights imparted to the purchaser were an interest in land and not chattel property.

Where having first granted such timber and rights to the plaintiff's assignor, the defendant five years after sold the timber to another person, who forthwith proceeded to cut the same.

Held, that the defendant was responsible to the plaintiff in damages; and, *per* FERGUSON J. that he would have been so, even if the timber sold were chattel property, for that the act of the defendant in selling to another person would in that case amount to a conversion of the property.

Per FERGUSON, J. In order that a deed may be reformed by the Court there must be at least two things established, namely, an agreement differing from the document well proved by such evidence as leaves no reasonable ground for doubt as to the existence and terms of such agreement, and a mutual mistake of the parties by reason of which such agreement was not properly expressed in the deed.

THIS was an action brought in the Chancery Division by John J. McNeill, against J. A. Haines for an injunction Statement. to restrain the cutting of timber upon certain lands, and for damages under the circumstances which are set out in the judgment of FERGUSON, J.

The action came on for trial before STREET, J., without a jury, at Barrie, on September 22nd, 1888, who gave judgment for the plaintiff for \$135 damages and costs.

The defendant now moved by way of appeal before the Divisional Court, and the motion came on for argument on December 18th, 1888.

Lount, Q.C., for the defendant. The agent Gow fraudulently read the deed of August 20th, 1873, as though it were a sale for five years only, and the deed was utterly void, and not merely voidable: *Foster v. McKinnon*, L. R.

Argument. 4 C. P. 704; *Vorley v. Cooke*, 1 Giff. 230; *Kennedy v. Green*, 3 M. & K. 699; *Ogilvie v. Jeaffreson*, 2 Giff. 353. Besides, we only sold to Whitesides such rights as we had, and Whitesides alone is liable: *Dickey v. McCaul*, 14 A. R. 166. The following cases were also referred to: *Johnston v. Shortreed*, 12 O. R. 633; *Bennet v. O'Meara*, 15 Gr. 396; *Summers v. Cook*, 28 Gr. 179; *Steinhoff v. McRae*, 13 O. R. 546; *Lavery v. Pursell*, 57 L. J. Ch. 570; *Harrison v. Great Western R. W. Co.*, 1 Q. B. D. 515.

J. A. McCarthy, for the plaintiff. The sale was one of realty, and our rights are absolute. The deed of 1873 was certainly not void, and the authorities cited upon that point do not apply, for there was certainly no complete error here, and no misrepresentation as to the nature of the document as in those cases. The defendant knew that he was conveying his pine, and to whom he was conveying it, and at most the deed was merely voidable, and was capable of confirmation and valid as against an innocent purchaser: *Hunter v. Walters*, L. R. 7 Ch. 75; Pollock on Contracts, 4th ed., p. 458, 460. The defendant was negligent, and is estopped by his own conduct: *Swan v. North British Australasian Co.*, 7 H. & N. 603; *Simons v. Great Western R. W. Co.*, 2 C. B. (N. S.) 620; Kerr on Frauds, 2nd ed., p. 349; Pollock on Contracts, 4th ed., p. 544; *Merchants Bank v. Moffatt*, 5 O. R. 122. The selling to Whitesides was sufficient on which to found an action for trespass: *Waterman on Trespass*, vol. 1, sec. 302.

March 18th, 1889. FERGUSON, J.:—

The plaintiff alleges that by deed dated 20th of August, 1873, made between the defendant and one Dymont, the defendant bargained and sold to Dymont all the pine timber he (Dymont) might choose to take off lot No. 9 in the fourth concession of the township of Chaffey in the district of Muskoka, during the term of twenty years thence ensuing, and that in the said deed the defendant covenanted with Dymont that he had the right to grant and convey the

timber, and that Dyment might peaceably and quietly without let, hindrance, or interruption from the defendant, or ^{Judgment.} any person or persons whomsoever cut, remove, and take away the said timber. That the defendant was at the time the locatee of the lot under the Free Grants and Homesteads Act of Ontario, having become locatee thereof before the 30th of September, 1871. That Dyment duly sold, granted, and assigned the timber, and all his rights under the deed to the plaintiff, and that since this transfer the defendant sold, cut, and removed large quantities of the timber, and prevented the plaintiff from cutting and removing the same. FERGUSON, J.

The statement of claim also contains the equivalents of counts in trespass *de bonis asportatis*, and in trover. The plaintiff claims damages, an injunction, and costs.

The defendant admits the execution of an agreement with Dyment made through one Gow an agent of Dyment, but says that the time for cutting and taking away the timber was really five years; that the document was drawn up by Gow; that it was read over to him by Gow before he executed it, and that when so reading the paper Gow fraudulently read it to him as if the period of five years were expressed in it, when in reality the period stated in the deed was twenty years. The defendant denies that he cut or removed any timber from the lot till after the expiration of the five years, and says that he performed the agreement that he really made, and by way of counter-claim the defendant asks a reformation of the agreement, or in the alternative that it be declared to be void and cancelled. The action was tried by Mr. Justice Street, without a jury, and in his judgment he seems to have dealt very fully with the evidence, arriving at the conclusion that the deed should neither be reformed nor declared to be void, and pronouncing judgment for the plaintiff for the sum of \$135 damages with costs (a).

(a) September 22nd, 1888. STREET, J.—The plaintiff starts out with a written contract between him and the defendant, the signature of which is denied by the defendant. The defendant endeavours to avoid the

Judgment.

FERGUSON, J. The motion is to set aside that judgment and to enter a judgment for the defendant on the law, the evidence and the weight of evidence, for the reason that the learned Judge was wrong in his holding that the alleged fraud had not been shewn to have been perpetrated in respect of the agreement, and that the evidence was not sufficient on which to reform the document, and that the judgment should have been for these reasons for the defendant:

operation of that contract by an allegation that the portion of it, that relating to the period for which the purchaser would have the right to cut the timber, was misread to him—that that part of the agreement was in fact obtained from him by fraud; and he asks to have the instrument reformed, and to have the words “five years” inserted instead of the words “twenty years,” which exist in the contract. The case is by no means free from difficulty, the evidence being of a very conflicting character; but the principles laid down in many cases of a similar character, I think, point out clearly the way in which this question should be decided. It is well established that a person who signs a written instrument of this kind, and especially a person who can read and write, must make out a very strong case indeed before the Courts will reform the instrument that he signed. All the probabilities of the case must lie in the direction of reforming an instrument before the Courts will alter what has been signed. The evidence of the defendant, and the evidence of his brother, are both positive in the direction in which the defendant seeks to have the agreement reformed.

The story of the defendant is that he met Mr. Gow, agent of the purchaser, at the Post Office, and that there the price (as I understood him) and the terms (including the period for which the privilege was to extend) were settled, there being no one there but Mr. Gow, a cousin of the defendant, and the defendant himself: that then a printed agreement was filled up by Gow, the only written part of the printed agreement being the date, the number of years, the lot, and the price: that the brother was then called in by Mr. Gow for the purpose of hearing the agreement read over: that it was then read over to him; and that the word “five” was read out where the word “twenty” now exists. The brother’s story is a little different. He says the agreement with regard to the price was come to several days before this meeting in the Post Office. He does not say whether any of the other terms were come to or not. Then he says he was called in by Mr. Gow to hear the agreement read; and that the word “five” was read out where the word “twenty” now appears. Then the defendant says that at the end of five years he went on to the lot and cut some timber and sold it to different people. He is not cross-examined as to that, and he does not bring any witnesses to corroborate his own story in that respect. Then nothing appears to have been discovered until fifteen years after the contract was made. At

also that the learned Judge was wrong in holding that ^{Judgment.} there was any liability on the part of the defendant in ^{FERGUSON, J} regard to the alleged trespass or acts, because it was shewn that these were all after the year 1885, and all that the defendant did was to sell whatever interest he had in the timber to one Whitesides, who having cut the same became liable in law to the plaintiff, and the defendant did not. The motion is also for a new trial for rejection of evidence

that time the plaintiff buys out Mr. Dymont, and finding some timber had been cut by Whitesides, and finding from Whitesides that he had bought from Dymont, he sees Dymont about it. Dymont was aware before that that the timber had been claimed by the plaintiff. He had time, therefore, I suppose, to consider what took place, and the circumstances under which he sold. When he is informed of the ground on which the plaintiff claims that he is entitled to the timber, namely, that the period for which the defendant had sold the timber had not expired, the defendant says that the sale was for five years. The plaintiff says that he has gone to the Registry Office and found that it was for twenty years. Then the defendant says he will go and see about it himself. After going to the Registry Office and finding the agreement says twenty years, he appears to make no complaint whatever, but he writes a letter immediately offering the plaintiff a settlement. It is upon that point that I think the case turns. At that period the defendant probably had in his mind—he perhaps had during the whole period in his mind—the idea that five years was the period for which he had sold the timber; but when he finds that twenty years has been put in the agreement, he does not say, “I have been defrauded; I only agreed to sell for five years; I am not bound by this twenty;” but he writes a letter in which he apparently treats the rights of the purchaser as being still in existence. Evidently he cannot have been as confident at that time as he professes to be now as to what had taken place. I think it is difficult to believe that a person who believed himself to have been defrauded as the defendant said he had been defrauded at that time, would, without seeking any redress, or asking any advice, at once tamely submit, and that he would sit down and write a letter to the person who represented the man by whom he had been defrauded, and offer and promise to pay him the full value of the timber the defendant had taken. I was certainly very much impressed with the fact that the defendant had, undoubtedly, at the end of five years, according to his own story, entered on this land again; but that may have been due to the fact that he was under the impression that he had only sold for five years. And I think that is really the explanation of the case. I do not for a moment intend to say that the defendant has not told what he believes to be true, or that his brother has not; but the written contract is a thing that must not be set aside except on the very strongest grounds, and the grounds here shown, although in some respects consist-

Judgment. going to shew that the agent Gow had been guilty of
FERGUSON, J. fraudulent acts having no connection, however, with the
one alleged.

As to the contention that there should be a reformation of the document I think this may be dismissed by saying that in no view of the matter in dispute could this take place upon what the plaintiff has alleged, and sought to prove, for what he says is not that there was a mutual

ent, are not thoroughly consistent with the story that the defendant now tells in the witness box.

The only evidences which tell in his favour are his own story and that of his brother, as to what took place at the signing of the contract, and the fact that he entered on the land again. As to what took place in the office at the time the agreement was signed, it is very possible to believe that the defendant and his brother, talking over the matter, have come to the conclusion that they are telling the truth now; but the story certainly is a singular one. It is a difficult thing to believe that Gow, having made up his mind to defraud the defendant, should of his own accord have multiplied witnesses against himself as to the fraud he was committing by calling in the brother to hear him read untruly the instrument that had been drawn; and not only that, but that he should have laid the instrument down before three literate persons who were looking over his shoulder and could have seen it, and then, without any concealment apparently, read it untruly. Then in support of the writings we have Mr. Gow's evidence of what took place; and this evidence is not open to the unfavourable comments that have been made upon it. He simply says that he does not remember about the circumstance, but that if the written document contains the word "twenty," he wrote it correctly. The only other question is as to the damages. The plaintiff's evidence as to the quantity is not to be depended upon, and he does not profess to have made a count. The evidence that struck me as most to be depended upon was the evidence of Mr. Fletcher taken in conjunction with the evidence of Mr. Whitesides. Mr. Fletcher seems to be a practical man; he looked over the timber; and he puts it at about 100,000 feet. Then Mr. Whitesides first of all says 60,000 feet. Then he will not say it was not over 80,000 feet. I think that the proper amount perhaps lies between those two, and I think I shall put the quantity at 90,000 feet. I can in the same way compare the estimate given by Fletcher of the value and the estimate given by Whitesides of the value. Some of the timber appears to have been of a very inferior quality, according to Whitesides's account—some of it was hardly fit to cut down and to manufacture. I think a dollar and a half a thousand for the 90,000 feet should be the amount of the damages. It is true that a larger sum was offered by the defendant, and a still greater sum was estimated by the defendant; but at that time the defendant had not consulted a lawyer; he knew that he had committed a

mistake of the parties to the instrument, but that Gow the ^{Judge.} agent of the then purchaser was guilty of a fraud, and as I ^{FERGUSON, J.} understand the law on the subject in order that a deed may be reformed by the Court there must be at least two things established, namely, an agreement differing from the document well proved, that is proved by evidence in some cases said to be irrefragable evidence, and in others evidence that would shake all minds alike, at all events by such evidence as leaves no reasonable ground for doubt as to the existence and terms of such agreement, and a mutual mistake of the parties by reason of which such agreement was not properly expressed in the deed.

I am of the opinion that the learned Judge was right in finding or holding that the alleged fraud was not established or proved by the evidence. If it had been established, the effect, I think, would have been, not that the document was void, but that it was voidable only: note to *Coke v. Vorley*, 1 Giff. 237, referring to Starkie on Law of Evidence, 2nd ed., p. 273. As the alleged fraud is not proved, it is not needful at all that I should pursue this further.

The deed in the present case when produced, shewed that it contained not only the covenant on the part of the defendant before mentioned that the then purchaser Dymont might "peaceably and quietly without the let, hindrance, or interruption of the defendant, or any other person whomsoever, cut, remove, and take away the timber," but the

trespass—at least that was the position that he believed himself to be in; and he was anxious to settle the matter without law. He was asked \$300, and he made an offer of \$50 less. However that may be there was no accurate estimate arrived at. It is true Mr. Whitesides was willing to allow the defendant to pay \$250; but I think that is easily explained—Mr. Whitesides himself did not know how far he might be liable to a lawsuit in the matter. I think the verdict should be for \$135 for the plaintiff and the costs.

MR. PEPLER: I submit that full costs ought to be allowed.

THE COURT.—The costs to be the costs that the verdict will carry on the pleadings, the costs of whatever Court the case ought to have been brought in. The question of costs may be mentioned to me again if necessary.

Judgment. further words that Dymont, "his heirs, administrators, and FERGUSON, J. assigns might construct roads upon and over the said lot, and adopt and take all reasonable and usual steps, actions, causes, and proceedings in and about the culling and removing of the timber as it might be found necessary to adopt." After an examination of the case *Summer v. Cook* 28 Gr. 179, and the cases referred to in that case, the subsequent cases of *Johnston v. Shortreed*, 12 O. R. 633, and *Steinhoff v. McRae*, 13 O. R. 546, and the cases referred to in these, one finds some difficulty in saying whether according to the law of our Court growing timber contracted to be sold and removed from the land is, under varying circumstances in different contracts, an interest in lands or chattel property only. The time in which the timber is, according to the contract, to be removed, has, in some of the cases, been made an element in considering this question, and in others the intention or not that the timber shall in the meantime and before removal derive advantage and sustenance from the lands, or, on the contrary, that the lands shall be considered a mere storehouse for the timber in the meantime, has been made an element in the consideration of the question, if not the one upon which it is to be determined.

In the present case the period that might have elapsed after the contract and before removal was twenty years (less, I suppose, the time necessary for the actual cutting and removal), a much longer period than that found to have existed in any of the cases alluded to; and I do not think it a fair conclusion, from all that appears, that in this case it was the intention of the parties that the timber should be merely stored upon the land for that long period; and I am therefore of the opinion that in this case the timber sold and purchased, together with the rights imparted by the deed to the purchaser, were and should be considered to be an interest in real estate, but for the purpose of determining the contention here, I do not think it absolutely necessary that this question should be determined, though it was much discussed in argument. I may add, how-

ever, that my own opinion is with the cases that decide that the timber is an interest in land. Assuming first that the interest sold by the defendant to Dymment was an interest in land, and not chattel property, then looking at the whole deed embracing the covenant of the defendant that I have before set out, I am of the opinion that it cannot properly be said that the defendant was unconnected with the act of Whitesides, his subsequent vendee, in cutting and removing the timber. Having once sold the timber and entered into this covenant with his then vendee, the defendant during the currency of the period for cutting and removing it, sold it again to Whitesides, who commenced cutting and removing. I think it may fairly be said that the defendant was a party to the acts done by Whitesides. I think the contention that the defendant merely sold to Whitesides whatever interest he had (which appears to have been no interest), and that he is not at all liable for or in respect of the cutting and removal of the timber by Whitesides cannot be maintained.

If, on the other hand, the interest sold to Dymment be considered chattel property only, I do not see why the act proved against the defendant is not good evidence of a conversion of the property sustaining the count in trover. I am of the opinion that it is such evidence, and sufficient for the purpose.

As to the motion for a new trial I think the evidence, the rejection of which is complained of, was properly rejected, and that the contention of the defendant on this ground fails.

Upon the whole case I am of the opinion that the judgment should be affirmed.

BOYD, C. :—

The defendant being locatee of the lot in question sold to Dymment the right to take pine timber off it for twenty years from August 20th, 1873. This right was manifested by deed wherein it was set forth that the said

Judgment. purchaser Dyment may peaceably and quietly without let,
BOYD, C. hindrance, or interruption from the said Haines or any person or persons whomsoever cut, remove, and take away the said timber. Dyment sold and conveyed his rights to the plaintiff on January 15th, 1885.

Haines obtained a patent from the Crown for the land in 1877, and in the fall of 1887 he sold for fifty dollars the timber to Whitesides. The cutting was chiefly done by Whitesides and apparently under this arrangement with the defendant, who claimed and claims that the agreement with Dyment was for five years only, and that it was a fraud to have twenty years inserted. His main defence is that the agreement with Dyment should be reformed, and as to the acts of cutting complained of he pleads "that he did not cut or remove any timber from off the said lot until after the expiration of five years from the date of said agreement." There is thus an admission of some cutting being done by him, but the point is now made that as the cutting was the act of Whitesides, the defendant is not liable in this action.

The trial Judge ruled against the motion for nonsuit on the ground that by selling to Whitesides the defendant gave authority to him to cut. A letter from the defendant was in evidence dated January, 1888, in which he offered a young brown mare in order to settle with the plaintiff for the timber that Whitesides had taken off, and money enough to make up in all \$250. The plaintiff offered to settle for \$300, one-half cash, and nothing more came of it. The defendant admits that he directed one Heath to go and cut a few broomsticks on the lot after 1885 for the value of which he would be accountable to the plaintiff. It was about 1000 feet, and perhaps \$10 would be the damages.

But the defendant treats the timber that Whitesides took off as done under his authority, and what he sold to Whitesides was all the timber that was on the land in 1885. But this he had already sold to Dyment, and the transaction with Whitesides was in direct derogation from

the plaintiffs' rights as Dymont's assignee. Whitesides evidence shews that it was after he bought from Haines that he went on to cut. Judgment.
Boyd, C.

It is a reasonable inference that but for Haines having sold to him, he would not have gone on to cut, and so it was the sale by Haines which led naturally to the spoliation of the plaintiff's timber. Now Haines's agreement with Dymont is, that Dymont is to have the right to remove the timber for twenty years without molestation or hindrance. I think the proper reading of the whole agreement shews that this was to enure for the benefit of Dymont's assignees, and if so, Haines is in another way liable for the damages committed by Whitesides claiming and acting under him: *Chibnall v Paul*, 29 W. R. 536; *Harris v. James*, 45 L. J. Q. B. D, 545; *Lewis v. Palmer*, 6 Wend. 367. The agreement for the sale of the timber for twenty years is clearly for an interest in land within the Statute of Frauds: *Summers v. Cook*, 28 Gr. 179; *Macdonnell v. McKay*, 15 Gr. 391; *Lavery v. Purssell*, 57 L. J. Ch. 570.

It was purchased for value by one who had no notice of the alleged fraud, and in the plaintiff's hands the defendant has no remedy even if he could successfully contend that the conclusion of fact as to the fraud of the trial Judge should be reversed: *Hunter v. Walters*, L. R. 7 Ch. 75. Upon the whole I see no valid reason for interfering, and the judgment should be affirmed, with costs.

PROUDFOOT, J. :—

The question in this case is, whether the timber sold to Dymont by the defendant, and transferred to McNeill is to be considered real estate or personal property. The contract upon the face of it gave twenty years for the removal of the timber, it was made in 1873, and registered in the county registry office three days afterwards. The plaintiff says he is a purchaser for value without notice of any equity of the defendant to have the contract rectified by limiting the time for removal of the timber to five years—

Judgment. and is entitled to the protection of the registration laws—
PROUDFOOT, J. and the defendant does not deny this, if the timber can be deemed real property.

I continue to hold the opinion I expressed in *Summers v. Cook*, 28 Gr. 179, that a contract for standing timber to be cut and removed is a contract for a chattel, even though a considerable time may be given for the removal. But in this opinion it seems that I am in a hopeless minority. The cases referred to in the argument shew that it must be considered an interest in land, and not a chattel.

I cannot assent to the argument that Haines's agreement, that he had a right to dispose of the timber, and that Dyment might peaceably and quietly possess it, was personal to Dyment.

I also think that Haines is liable in this action, although the greater part of the cutting was done by Whitesides, to whom Haines sold the timber in 1887. This sale was a violation of the agreement with Dyment, and the money he received for it was received for that which he had already sold to Dyment.

I think the judgment should not be disturbed.

Afterwards upon the plaintiff taxing his costs of this action before the local Master at Barrie, that official ruled that he was entitled to costs on the Superior Court scale.

The defendant appealed, and the appeal was argued on May 13th, 1889, before FERGUSON, J., when the Master's ruling was affirmed. (See 13 P. R. 115.)

A. H. F. L.

[QUEEN'S BENCH DIVISION.]

RE RICHARDSON AND THE CITY OF TORONTO.

RE HOSPITAL TRUST AND THE CITY OF TORONTO.

Municipal corporations—Expropriation of lands—Compensation to owners—Method of estimating—Benefit to lands not taken—Special assessment—49 Vic. ch. 66 (O.).

Under the authority of 49 Vic. ch. 66 (O.) the city of Toronto expropriated the lands of private persons near the river Don, for the purposes of the "Don Improvement Scheme." By the Act the city council were to make a survey and plan of the 400 feet on each side of a certain line called "the centre line," shewing the lands taken by them, and were to apportion to each lot shewn upon the plan a due share of the whole cost of the land, works, and improvements; and by sec. 4, sub-sec. 3, the lands not taken within the 400 feet were to be specially assessed in respect of such improvements, but no such special assessment was to exceed the actual value of the benefit derived from the improvement. The appellants owned lands extending from the centre line to a distance exceeding 400 feet, and the city took from such lands a strip narrower than the 400 feet.

Held, that in awarding compensation to the appellants under the Municipal Act for the parts of their lands taken, the arbitrators should allow for any benefit to the parts not taken, but in estimating that benefit they should take into account, as best they could, the fact that the land-owners were liable to be charged by the city to the extent of the benefit they received, by a rate as for a local improvement under sec. 4, sub-sec. 3.

AN appeal by Charles Richardson and the Toronto Statement.
General Hospital Trust from the award of three arbitrators as to the compensation to be allowed the appellants for portions of their lands in the neighbourhood of the river Don, taken by the city of Toronto under 49 Vic. ch. 66 (O.) for the purposes of the "Don Improvement Scheme."

The appellants complained of the principle on which the compensation had been estimated.

The facts are fully set out in the judgment.

June 14, 1889. The appeal was argued before STREET, J., in Court.

Bain, Q.C., and H. D. Gamble, for the appellants.

W. A. Reeve, Q.C., and C. R. W. Biggar, for the city of Toronto.

Judgment. June 17, 1889. STREET, J.:—

STREET, J.

The corporation of the city of Toronto have taken lands of the claimants under the authority conferred upon them by ch. 66, 49 Vic., Ontario Statutes of 1886. The claimants in each case own lands extending from the centre line mentioned in sub-sec. 2 of sec. 1, to a distance exceeding 400 feet, and the city has taken of their land a strip narrower than the 400 feet which they are authorized to take.

The by-law of the city council authorizing the taking of this particular land was passed in May, 1888, and the notice to the land-owners is to be taken as having been given immediately after the passing of the by-law.

Disputes having arisen as to amount of compensation to be paid, the matter was referred to arbitration under the provisions of the Municipal Act, and the arbitrators have made their award, and at the request of the parties have stated the mode in which they have arrived at the amount awarded. They say "We deducted from the value of the said property which the city expropriated belonging to the above Charles Richardson what we considered was the increase in value of the rest of his property occasioned by the "Don Improvement Scheme." That upon the above reference we considered the value of the land Mr. Richardson has and the increase in its value arising from the Don improvements, and that we as arbitrators fixed the benefit he has derived, and that we also fixed the value of the property taken, and that we deducted the one from the other, and that the amount in our award was arrived at in that way."

The claimants have appealed against this mode of estimating the damages under the Act.

The question comes up in a somewhat different form from that which was considered by me in *Re Pryce and The City of Toronto*, 16 O. R. 726, but the same principles are to be applied. The land-owner is entitled to full compensation for the land taken and the injury sustained. That

compensation must be given entirely in money where the injury is the only element, and no benefit results from the work for which the property is taken. But in cases where there is benefit to the property not taken, as the result of the work for which a part is taken, then the land-owner must make allowance for the benefit he receives in his claim for the injury which he sustains. The principle is, that where private property is taken for the public good, the private owner must not suffer, but must be fully compensated for that which is taken from him, but is not to make a profit out of the necessity which compels the public to take his property.

Judgment.

STREET, J.

I think that the arbitrators here have taken a course which does not give full compensation to the claimants here under the special clauses of the Act in question. By the Act the city council are to make a survey and plan of the 400 feet on each side of the centre line, shewing the lands taken by them, and are to apportion to each lot shewn upon the plan a due share of the whole cost of the land, works, and improvements. Then by sub-sec. 3 of sec. 4 those lands which they have not taken within the 400 feet shall be specially assessed in respect of such improvements, but no such special assessment shall exceed the actual value of the benefit derived by said lands from the said improvement, the amount of such benefit to be ascertained under the provisions of the Municipal Act in that behalf. Under this sub-section it is plain that the lands not taken within the 400 feet are liable to be called upon to pay to the city the amount of the benefit which they derive from the improvements made. The assessment here spoken of is not the valuation of the property by the assessors, but the charging or assessing against each lot of its share of the cost. It follows that if the arbitrators should, for example, find the original value of the whole lot to be \$1200, and of the part taken to be \$400, and the benefit to the part within the 400 feet not taken to be \$300, and should allow the claimant the \$400, and then deduct from it the \$300 as the benefit derived, and then

Judgment. the city should assess him for the \$300 as a local improvement rate, he would pay the \$300 twice. The arbitrators in arriving at the compensation to be paid should certainly allow, in my opinion, for any benefit the claimant derives, but in estimating that benefit they must take into account as best they can the fact that he is liable to be charged by the city to the extent of the benefit he receives by a rate as for a local improvement under this sub-sec. (3) of sec. 4 of the Act. It may be difficult to estimate with any degree of exactness what this liability may extend to, but, so far as I can see, this is the only time at which it can be properly taken into consideration.

I think the award should be remitted to the arbitrators in order that they may take this element into consideration, as I gather from their certificate that they have not done so. The claimants should be entitled to the costs of the motion in any event.

It would perhaps save the costs of any further reference back, if the arbitrators should find such facts with regard to the values and benefits derived by the different parcels of land as may enable the Court to dispose of the matter in any view that may be taken of the law; these would be:

1st. The value of the whole parcel belonging to the claimant immediately before the passing of the by-law in question.

2nd. The values of the parcel outside the 400 feet strip, and of the parcel not taken within the 400 feet strip, immediately after the passing of the by-law.

3rd. The value of the parcel taken at the time of the passing of the by-law.

4th. The value of the benefit derived by each parcel not taken, from the proposed work.

[CHANCERY DIVISION.]

THE ELECTRIC DESPATCH COMPANY OF TORONTO

V.

THE BELL TELEPHONE COMPANY OF CANADA.

Contract—Telephone Company—Messenger business—Agreement as to transmission of orders for messengers—Other telephone subscribers' rights—Construction of agreement.

The defendants were a company carrying on a general telephone business with a central office to connect subscribers' telephones, and in addition carried on a messenger business for the purpose of delivering letters, messages, &c. By an agreement the defendants assigned their messenger business to the plaintiffs and covenanted that they would not transmit or give directly or indirectly any messenger order to any person, except the plaintiffs, and that they would cease to do such business. The G. N. W. Telegraph Co., (one of the defendants' telephone subscribers,) subsequently opened an office for a messenger business, and applied for a telephone in the usual way which the defendants supplied them with and by means of it the G. N. W. Telegraph Co. received orders for messengers, &c.

Held, that the defendants did not transmit or give messenger orders when they placed a subscriber in communication (through the central office) with the G. N. W. Telegraph Co., that they only afforded him a medium by which to transmit or give his own order, which was a case not provided for by the agreement, and the action for an injunction to restrain defendants was dismissed with costs.

THIS was an action brought on an agreement between the Statement. plaintiffs and defendants, by which the defendants had assigned a messenger business they had been carrying on to the plaintiffs; and, among other things, had covenanted as follows (16): "That they will in no manner, and at no time during the term of this agreement transmit, or give directly or indirectly free or for remuneration any messenger, cab, city express, or livery orders to any person or persons, company or corporation, except the Electric Despatch Company as herein set forth; and that from and after the first day of October next, they will cease to do any such business as is herein agreed to be done by the Electric Company."

The action was tried at Toronto, on June 2nd, 1888, before FALCONBRIDGE, J.

Statement.

It appeared that the defendants were a telephone company doing a general telephone business, with a central office through which their telephone subscribers were connected, or placed in communication with each other: that previous to the agreement in question they had carried on a messenger business for the purpose of delivering letters, messages, &c.: that this messenger business had been assigned by them to the plaintiffs by the agreement in which the covenant not to transmit orders (above set out) was contained: that subsequently the Great North-Western Telegraph Company, who were subscribers of the defendants, opened an office for the purpose of carrying on a messenger business of their own similar to that of the plaintiffs, and applied for and obtained a telephone in the usual way for use in that office, through which telephone they received orders from such other subscribers as desired messengers to be sent, or messages to be delivered, and such subscribers were connected or placed in communication with the Great North-Western Telegraph Company through the defendants central office, and the plaintiffs claimed that this was a violation of the terms of the said agreement.

The further facts are set out in the judgment.

Robinson, Q. C., and Reeve, Q. C., for the plaintiffs. The defendants say they do not transmit orders, but the evidence shews that they do: *Attorney-General v. Edison Co.*, 6 Q. B. D, 244. The evidence also shews that they could control the business, and so could keep their agreement and protect the plaintiffs. There may be American authority that defendants were bound to serve all the public alike, but no English authority goes to that extent. The defendants are not on the same footing as a common carrier bound to treat and charge all alike: *Baxter v. Dominion Telegraph Co.*, 37 U. C. R. 482. *Great Western R. W. Co. v. Sutton*, L. R. 4 H. L. at p. 237. The agreement shews defendants intended to give plaintiffs a

monopoly of the messenger business. The passing over the lines the words of the subscriber is a transmission within the meaning of the agreement. The defendants had the right to make the agreement as contended for by plaintiffs: *Vicker's Express Co. v. Canadian Pacific R. W. Co.*, 13 A. R. 210; *The Ontario Salt Co. v. The Merchants Salt Co.*, 18 Gr. 540.

Lash, Q. C., and *S. G. Wood*, for defendants. If defendants undertook to carry out the agreement in the manner contended for by the plaintiffs, they would forfeit their charter or patent. It would be a physical impossibility to listen to all subscriber's messages and interfere with them; besides that, the statute would prevent such action: 43 Vic. ch. 67, sec. 25 (D.) No such course was intended, and it would be contrary to public policy: *State v. Telephone Co.*, 38 Am. Law Rep., 583, at p. 587 note; *State of Missouri ex rel Baltimore and Ohio Telegraph Co. v. Bell Telephone Co.*, 23 Am. Law Reg., N. S. 573; 23 Fed. Rep. 539. The defendants have no right to refuse a telephone to any of the public, and the agreement in question was made by both parties with a knowledge of that fact: *State v. Nebraska Telephone Co.*, 52 Am. R. 404, 31 Albany L. J. 143, 22 Cent. L. J. 33, Article; *Hockett v. State*, 25 Am. Law Reg. at p. 327; *Louisville Transfer Co. v. American District Telephone Co.*, 24 Albany L. J. 283. The letters between the parties are admissible to explain the agreement: *Pearson v. Pearson*, 27 Ch. D. 148. The American decisions are entitled to deference in telephone cases.

Robinson, Q. C., in reply. An exchange or central office has nothing to do with defendants' charter or patent. They are not obliged to have one at all. They provide the means to transmit the voice. As to the impossibility of performance see Pollock on Contracts, 4th ed., p. 356.

December 4, 1888. FALCONBRIDGE, J. :—

By memorandum of agreement bearing date the 12th day of September, 1882, and made between the Canadian Tele-

Judgment.
Falconbridge,
J.

phone Company of the first part, the defendants of the second part, the plaintiffs of the third part, and Melvin M. Rosebrugh and Isaac T. H. Brown of the fourth part, after reciting the pendency in the Chancery Division of an action by the Canadian Telephone Company against the present defendants for infringement of patent, and the transfer of the patent to the defendants, and an agreement for the sale by the defendants to the plaintiffs of a General District Messenger, Cab, City Express, Cartage, and Livery call business, it was agreed that the suit should be terminated on the terms therein mentioned, and the defendants covenanted (1) to assign to plaintiffs for ten years from 1st October, 1882, the said business and the good-will thereof; (2) to transfer the telephone line-wires of cabmen, carters, &c., who are subscribers from the central office of the defendants through a switch placed in central office of plaintiffs, so that all telephone communications over said wires of such cabmen, &c., must pass through such switch. [Here the learned Judge read clause 16 set out above].

By indenture dated 14th June, 1883, the plaintiffs retransferred to the defendants all the cab, city express, cartage, and livery call business, the covenants, &c., relating thereto in the agreement of 12th September, 1882, being cancelled, the messenger business only remaining in plaintiffs' hands.

About July, 1887, the G. N. W. Telegraph Company opened an office on King street for the purpose of supplying a special messenger service. The manager applied to the defendant's Toronto manager for a telephone in July, and (after defendant's Toronto manager had communicated with his head office) one was put in about the end of August. A written contract was signed. It contains no restrictions as to the use which the G. N. W. Telegraph Company were to make of the instrument, and they at once commenced to use it in their special messenger business, and have continued so to use it. This is the same business as that carried on by plaintiffs.

The G. N. W. Telegraph Company had a telephone at

their head office in Toronto long before they commenced the messenger business, and they used the King street office telephone for other purposes besides the messenger business, and their manager says that outside of that branch of their business it would be a great inconvenience to them to be without it. Judgment.
Falconbridge,
J.

The case in hand turns on the true construction of clause 16.

There has been filed a spirited correspondence between the respective managers of plaintiff's and defendant's companies, which sets out clearly what the assertion of right is on the one side and on the other.

Briefly it is this. The plaintiffs contend that the defendants by placing their subscribers or lessees in direct telephone communication with the G. N. W. Telegraph Company, and thereby enabling such subscribers to order messengers, have acted in violation of their covenant not to transmit or give any such orders, &c., and the plaintiffs ask for damages and an injunction.

The defendants say they have a perfect right to do what is complained of, and that according to the true intent and meaning of the covenant it was never intended to deprive subscribers of the right to communicate with each other, nor to compel defendants to attempt to intercept, restrict, control, or interfere with any communication passing over defendant's lines, and that the only cases intended to be covered were (a) where a person comes to one of defendants offices or stations and states a message which he wishes to be delivered, or instead of coming to the office or station communicates the same thereto by telephone (b) where a person coming to the office (or by telephonic communication therewith) requests that a messenger should be furnished or sent him.

It is argued that the evidence shews that it was not in defendants' power to observe this covenant to the full extent, and with the meaning and intent contended for by plaintiffs.

There are about twenty operators in defendants' central

Judgment. office; each one is liable to be called up by from fifty
Falconbridge, to one hundred subscribers, and they make two or three
J. connections per minute. They can overhear the conversation while there is only one being carried on, but of course they cannot do so when they are required to answer another call.

It may well be that this case falls within that class where the performance of the agreement is not impossible in its own nature, but impossible in fact by reason of the particular circumstances, and where this kind of impossibility is held to be no excuse for non-performance of the contract. Be that as it may, the practical physical impossibility of controlling or even listening to all the conversations which are being carried on over the lines affords a potent argument against the proposition that such was the intention of the parties, or that the plaintiffs would have imposed, and the defendants undertaken, such a duty.

I apply in the same way the argument that the defendants had and have no right to refuse to supply the G. N. W. Telegraph Co. as part of the general public with one of their instruments, or to invidiously control their use of it. There is high American authority for this proposition, and in matters of modern scientific development such as this, and especially in the comparative absence of English or Canadian decisions, the opinions of able Judges in the United States are entitled to great respect.

See *State of Missouri ex. rel., Baltimore and Ohio Telegraph Co., v. Bell Telephone Co.*, 24 Am. Law Reg. N. S. 573; see notes at p. 578; *Hockett v. State*, 25 Am. Law Reg. N.S.327; *Louisville Transfer Co. v. American District Telephone Co.*; 24 Albany L. J. 283; 22 Cent. L. J. 33 Article; and many other cases.

True, in *Baxter v. Dominion Telegraph Co.*, 37 U.C.R. 470, *semble*, that the liability of Telegraph Companies is not analogous to or co-extensive with that of a common carrier.

I am not deciding this point when I say that this consideration (involving as it may, peril to defendants' fran-

chise, and to their patent) weighs with me not precisely as matter tending to avoid the contract as being against public policy or otherwise, but as shewing that the plaintiffs' construction is not the true one and never was intended. Judgment. Falconbridge, J.

The defendants' act of incorporation is the 43 Vic. (D.) ch. 67. I do not think a perusal of the Act throws much light on the subject. By sec. 2 the company has power " * * to sell or let any line or lines for the transmission of messages by telephone." *Quære*, transmission by whom? by the subscriber, or by the company for the subscriber? sec. 25 makes it a misdemeanour "to wilfully obstruct or interfere with the working of the said telephone lines, or to intercept any message transmitted thereon."

There is a short discussion about "transmission" in *Attorney General v. Edison Telephone Co.*, 6 Q. B. D. at p. 258.

The contract deals with numerous other business rights besides the one in question, the main objects being to settle the suit, and transfer the business.

I hold that the defendants do not transmit or give messenger orders when they place a subscriber in communication with the Great North-Western Company. They afford him a medium by which he transmits or gives his own order, a case not provided for by the agreement.

I dismiss the action with costs. The counter-claim was apparently a very trivial matter. If the defendants claim it, they may have a reference as to it, and the costs of the counter-claim and reference will be reserved for consideration after the Master shall have made his report.

G. A. B.

NOTE—The appeal from this judgment to the Divisional Court was dismissed with costs.—REP.

[QUEEN'S BENCH DIVISION.]

PEARSON V. MULHOLLAND ET AL.

Deed—Description—False demonstration—Exception void for uncertainty—Operation of release—"Remise, release, and quit claim"—Operation of, as grant or bargain and sale—14 & 15 Vic. ch. 7, sec. 2—Possessory title.

L. in conveying land to S. described it as being composed of the southerly half of lot 17 in the 4th concession of King, giving it the metes and bounds of the east half. The only part of lot 17 which L. had was that conveyed to him by B. as a part of lot 17, giving it the metes and bounds of the east half, the same as in the deed to S.; and the same quantity was conveyed in both deeds.

Held, that the metes and bounds given in the deed to S. correctly described the lands intended to be conveyed, and the words "southerly half" were controlled by them.

A sheriff's deed of lands sold at a tax sale described them as "forty-five acres of the south half of lot 17 in the 4th concession" of King; and the deed to S. before mentioned contained an exception, "save and excepting out of the same forty-five acres sold for taxes."

Held, that the exception was void for uncertainty; and a subsequent release of lands purchased at the tax sale by the sheriff's vendee to S. had sufficient to operate upon and was effectual as a release.

By indenture of bargain and sale made in 1856 between L. and K., L. in consideration of \$4,000 (the receipt whereof was thereby acknowledged) did remise, release, and quit claim unto K., his heirs and assigns, the south half, &c., to have and to hold, &c.

Held, that since 14 & 15 Vic. ch. 7, sec. 2, the words "remise, release, and quit claim," may operate as a grant; and either before or since that enactment they would operate as a bargain and sale.

Acre v. Livingstone, 24 U. C. R. 282, not followed.

Held, also, upon the evidence, that the defendant had no such possession of the land in question as would extinguish the title of the true owner.

Statement.

THIS was an action brought to recover the east half of lot number 17 in the 4th concession of the township of King, and was commenced on the 21st March, 1885.

The defendant Mulholland, besides denying the plaintiff's title, asserted title in one John McLean in fee simple, and a conveyance thereof by McLean to him; and also asserted title in himself and those under whom he claimed by length of possession.

The case was tried at the Autumn Sittings, 1888, of this Court in the Chancery Division, at Toronto, before ROBERTSON, J.

It appeared that on the 20th May, 1801, the Crown

granted lot number 17 in the 4th concession of King, de- Statement.
scribing it by metes and bounds, to one Phoebe Adair in fee; that on the 7th June, 1804, John Adair and Phoebe Adair, his wife, by deed duly acknowledged, conveyed the said lot to one John Beam in fee; that on the 4th June, 1831, the said John Beam, by deed, conveyed to one Daniel Lewis in fee that parcel of land containing by admeasurement one hundred acres, be the same more or less, being composed of *part* of lot number 17 in the 4th concession of King, described as follows: "beginning where a post has been planted in front of the said concession at the south east angle of said lot, then north nine degrees west twenty chains, then south seventy-four degrees west fifty chains, then south nine degrees east twenty chains, then north seventy-four degrees east fifty chains, to the place of beginning."

On the 31st December, 1831, W. B. Jarvis, sheriff of the Home District, conveyed to William Dickson the younger in fee, as the purchaser thereof under a sale thereof for taxes, "forty-five acres of the *south* half of said lot number 17 in the 4th concession of the said township of King;" that on the 16th November, 1832, the said Daniel Lewis conveyed to Samuel Street in fee "one hundred acres, be the same more or less, being composed of the southerly half of lot number 17 in the 4th concession of the said township of King, butted and bounded or may be otherwise known as follows, that is to say"—giving the same metes and bounds as in the said deed from John Beam to the said Daniel Lewis, save and excepting out of the same, forty-five acres sold for taxes.

On the 3rd August, 1833, the said William Dickson the younger, by deed poll, for and in consideration of five shillings of lawful money of Upper Canada to him in hand well and truly paid by Samuel Street, the receipt whereof at or before the ensealing and delivery thereof was thereby acknowledged and confessed, did "remise, release, and forever quit claim" unto the said Samuel Street, his heirs and assigns, all those certain parcels or tracts of land situate,

Statement.

lying, and being in the Home District of the said Province of Upper Canada, containing together eight thousand seven hundred and eighty-eight acres, which were by him purchased at the public sale for arrears of taxes in the month of October, one thousand eight hundred and thirty, and confirmed to him by the deeds of the sheriff of the said Home District, bearing date the 31st December, 1831, including therein forty-five acres of the south half of lot number 17 in the 4th concession of the said township of King, to have and to hold the said eight thousand seven hundred and eighty-eight acres of land, with all the privileges and appurtenances thereunto in any wise belonging or appertaining, to him, the said Samuel Street, his heirs and assigns forever.

On the 18th January, 1853, Thomas Clark Street only son and heir-at-law and devisee in trust of Samuel Street, conveyed to Simeon Draper in fee one hundred acres, be the same more or less, being composed of the *south* half of lot number 17 in the 4th concession of the said township of King; that on the 20th of April, 1854, the said Simeon Draper by deed conveyed to Eugene Ledenter in fee one hundred acres, be the same more or less, being composed of the *south* half of lot number 17 in the 4th concession of the said township of King; and that on the 19th May, 1856, by indenture of bargain and sale made between the said Eugene Ledenter and one Joseph Keen, the said Eugene Ledenter in consideration of four thousand dollars of lawful money of the United States of America to him in hand paid by the said Joseph Keen, the receipt whereof was thereby acknowledged, did "remise, release, and quit claim" unto the said Joseph Keen, his heirs and assigns, one hundred acres, being composed of the *south* half of lot number 17 in the 4th concession of the said township of King; also the east half of lot number 18 and lot number 19 in the 4th concession of the said township of King, to have and to hold all and singular the above mentioned and described premises, together with the appurtenances, unto the said Joseph Keen, his heirs and assigns forever; that on the

16th April, 1873, the said Joseph Keen conveyed to one Donald McKay in fee certain lands, being composed of the *south* half of lot number 17, the east half of lot number 18, and lot number 19 in the 4th concession of the said township of King. Statement.

On the 31st August, 1877, the defendant entered into an agreement under seal for the purchase of the south half of lot 17, the east half of lot 18, and lot 19 in the 4th concession of the said township of King, for the sum of \$2,050, payable on the 1st October, 1877; and on the 9th October, 1877, the said Donald McKay conveyed to Dennis B. Pearson in fee the *east* half of lot number 17, the east half of lot number 18, and lot number 19 in the 4th concession of the said township of King.

On the 24th October, 1877, Thomas Brock Fuller and Richard Miller, executors of the last will and testament of Thomas Clark Street, deceased, by deed, in which it was recited that by deed dated the 18th January, 1833, Thomas Clark Street conveyed to Simeon Draper the south half of lot number 17 in the 4th concession of the township of King, and that Thomas Clark Street had not any title to the said south half, but only to the whole of the east half, of lot number 17, being the lands which the said Thomas Clark Street intended to convey to the said Simeon Draper, and that the executors of the said Thomas Clark Street were desirous of rectifying the said mistake, and that the said Dennis B. Pearson had by conveyance become entitled to the said east half, conveyed to the said Dennis B. Pearson in fee the east half of lot number 17 in the 4th concession of the said township of King; that on the 6th October, 1879, the said Dennis B. Pearson conveyed to the plaintiff the east half of the said lot; that on the 14th November, 1884, the widow and heirs-at-law and devisees of Simeon Draper by deed, in which it was recited that Simeon Draper did on the 20th April, 1884, execute and deliver unto Eugene Ledenter a good and sufficient conveyance in fee simple of the land thereunder mentioned, which said conveyance was lost, conveyed to the plaintiff

Statement. in fee the east half of lot number 17 in the 4th concession of the township of King.

The will of Thomas Street was shewn giving the power to Messrs. Fuller and Miller to make the conveyance of the 24th October, 1877; as was also the will of Simeon Draper shewing the power of his widow and heirs-at-law and devisees to make the conveyance of the 14th November, 1884.

It also appeared that on the 16th of April, 1853, one John McLean conveyed to the defendant Thomas Mulholland in fee all that certain parcel, &c., containing by admeasurement one hundred acres, be the same more or less, being composed of the north west half of lot number 17 in the 4th concession of the said township of King, which said one hundred acres of land is butted and bounded or may be otherwise known as follows, that is to say: commencing at the south east angle of the said lot, where a post has been planted in front of the said concession; then north nine degrees west twenty chains; then south seventy-four degrees west fifty chains; then south nine degrees east twenty chains; then north seventy-four degrees east fifty chains to the place of beginning. No title was shewn in McLean, nor that he ever had possession of any part of the lot.

It was shewn that by deed dated the 17th day of December, 1858, the defendant Thomas Mullholland gave to one George Henry license to enter upon, among other lands, the north half of lot 17 in the 4th concession of King, containing by admeasurement one hundred acres, owned by the said Thomas Mullholland, and to cut timber thereon. It appeared that sometime in the fall of 1857 the said Joseph Keen gave authority to one H. S. Draper to sell the timber upon the said lands so conveyed to him by Ledenter, and that in the month of May, 1858, Keen paid a visit to the said lands and went upon them for the purpose of seeing H. S. Draper's operations.

On the 17th April, 1863, an agreement was made by H. S. Draper with the said George Henry by which H. S. Draper sold to the said George Henry one million feet

board measure of pine timber to be selected by the said **Statement.** George Henry "from the timber now standing or growing upon lands belonging to the said H. S. Draper described as follows: the south-east quarter of lot 17 in the 4th concession, containing fifty acres, the east half of lot 18 in the 4th concession, containing one hundred acres, the east half of lot 19 in the 4th concession, containing one hundred acres; also one half of the west half of lot 19 in the 4th concession," and to be removed during the winter of 1863 and 1864.

In 1867 H. S. Draper sold to Charles Irwin the red ash timber on the lands, including the east half of lot 17 in the 4th concession of King, who cut and removed the same.

H. S. Draper about 1865 or 1866 gave Timothy Harman permission to go upon the land and build and stop until such time as he told him to leave, and under such permission he went and built a small house on the south east quarter of lot 17 in the 4th concession, cleared about ten acres, and remained thereon about three or four years, when he sold out his improvements to his brother Richard Harman; H. S. Draper told Richard Harman that he had better give his brother Timothy something for his improvements, and take possession, and he accordingly did so; Timothy went out of possession in October, 1868, and Richard went in and continued in possession till April, 1881; during that time, it did not appear when, he cleared more of the south east quarter, and about twelve acres of the north east quarter adjoining his clearing on the south east quarter.

Some time about 1872 the defendant Mulholland procured Richard Harman, by claiming that he was the owner of the east half of lot number 17 in the 4th concession of the township of King, and by threatening to take proceedings against him, to execute a lease under seal dated the 1st October, 1872, of the said east half for four years from that date at a yearly rent of twenty cents. Shortly after the conveyance of the said land was made to Donald McKay, he was demanding possession of the land from Richard Harman, and the defendant wrote to Richard Harman:

Statement.

"April 8, 1874. Yours is to hand, and in reply, you say I have not given you legal possession. What better possession can you have? You appear to be very anxious to find fault. What right have you to trouble yourself with McKay until he takes legal proceedings? You appear to be very anxious to give up to McKay. I am told he has offered you money to give up possession. Perhaps you do not know the penalty of betraying your landlord. You say the lease is not registered. What difference does that make? If you want another lease you had better come down and see me. I do not understand what you mean *except it is to get both of us into trouble*; you say you will give up to McKay; I will keep your letter, and bring your own words against you. My lawyer says you are conniving with McKay against me, and should be committed to prison for so doing; if you want anything further come down and see me. McKay has been talking a long time about bringing an action against me; he wants to undermine me by getting my tenant to help him."

Richard Harman swore that he never paid any rent to the defendant Mulholland under this lease. On the 20th December, 1879, Nathaniel Pearson by indenture of lease demised to Richard Harman the east half of lot 17 in the 4th concession, to hold for two years, at the yearly rent of one dollar, which the latter swore he duly paid, and that he remained in undisturbed possession of the land under this lease until the expiration of it in 1881, when he left and went to another place, locking up the house and giving the key to Mr. Benjamin Pearson, who acted as agent for the plaintiff. During the currency of this lease the plaintiff went upon the said land to look at it. After Richard Harman left the land it remained vacant some time, and then the defendant Mulholland put one Kirk in possession under an agreement for a lease dated April 1st, 1882, to hold for five years, at \$50 a year, who remained in possession for not quite a year and then left, and then the plaintiff on the 21st April, 1883, by indenture demised the said land to Thomas Harman for five years, at \$30 for the first year, and \$40 for each subsequent year.

Donald McKay was called as a witness and proved that ^{Statement.} what he agreed to sell to the defendant Mulholland and what he agreed to buy was the east half of lot 17 in the 4th concession of King; that he mentioned specifically the east half because the defendant Mulholland mentioned that he thought the east half belonged to him, and he should sell him the west; but McKay said, "no," that he "would sell him the east"; his object was to get the whole lot; that the defendant Mulholland gave the instructions for drawing the agreement, and that he, McKay, signed it without reading it, or its being read over to him; that he subsequently received this letter from the defendant Mulholland:

"September 26, 1877.

"Both your letters are to hand. You had better defer coming until the 6th October. I am raising the money and may not have it before that date. There is a good deal of slander about the land, particularly lot 17; people say neither of us have any title, but I think with good management we may overcome every difficulty, although there does appear to be some foundation at there being two dowers, but I hope it's all right."

That he subsequently went twice to see the defendant Mulholland, but did not find him at home, and then repudiated the bargain.

The learned Judge gave judgment for the plaintiff with costs, and he found that the defendant Mulholland practised a fraud upon McKay in giving instructions to insert the south half instead of the east half of lot 17 in the 4th concession of King in the agreement of the 31st August, 1877.

On the 4th February, 1889, *Merritt* moved to set aside the said judgment and to enter it for the defendant Mulholland, on the following among other grounds: (1) The title to the southerly forty-five acres of the land in question was, as the plaintiff alleged, in William Dickson, and no conveyance from the said Dickson sufficient to pass the title was produced. (2) The title to the lands in question having vested, as the plaintiff alleged, in one Ledentu,

Argument. no conveyance was produced except a quit claim deed of the southerly half, which was inoperative and insufficient to pass any title. (3) The conveyance from the heirs of Draper and the executors of T. C. Street are inoperative, the grantors not being in possession, nor having any title capable of passing except by release to the party in possession. (4) The plaintiff's title is barred by the Statute of Limitations.

E. Douglas Armour shewed cause.

March 7, 1889. The judgment of the Court was delivered by

ARMOUR, C. J.:—

It will be of considerable consequence in determining the questions presented in this case, to determine in the first place the proper construction to be placed upon the description of the land conveyed by the deed from Daniel Lewis to Samuel Street as being composed of the southerly half of lot number 17 in the 4th concession of the township of King, giving it the metes and bounds of the east half.

Now, when we find that the only part of the lot which Daniel Lewis had was that conveyed to him by John Beam as a part of lot number 17 in the 4th concession of the township of King, giving it the metes and bounds of the east half, and when we find him conveying to Samuel Street the same quantity of land as was conveyed to him, and describing it as being composed of the southerly half of lot number 17 in the 4th, but giving it the same metes and bounds as were given in the deed from John Beam to him, we are driven to the conclusion that the metes and bounds given in the deed correctly describe the land intended to be conveyed, and that the words "southerly half" must be held to be controlled by them.

"If lands are described by the number or name of the lot or parcel, and also by metes and bounds, and the gran-

tor owns lands answering to the one description, and not to the other, the description of the lands which he owned will be taken to be the true one, and the other will be rejected as *falsa demonstratio*." Taylor on Evidence, 8th ed., sec. 1221.

The exception in the deed from Daniel Lewis to Samuel Street, "save and excepting out of the same forty-five acres sold for taxes," is, in our opinion, void. The deed from the sheriff to William Dickson the younger must be taken to correctly shew what lands were sold for taxes, and it describes them as "forty-five acres of the south half of lot number 17 in the 4th concession" of the township of King, giving no other description of the lands sold, and such a deed has been held to be void for uncertainty: *Fraser v. Mattice*, 19 U. C. R. 150: *McDonell v. McDonald*, 24 U. C. R. 74. The uncertainty as to which acres are excepted, which of the acres are the forty-five acres excepted, renders the exception void; for here there can be no election: see *Fraser v. Mattice*. But out of a general a part may be excepted, as out of a manor an acre, and not a part of a certainty, as out of twenty acres one: 1 Co. Litt. 47a.; Shep. Touchstone 78.

Treating, therefore, the deed poll from William Dickson the younger to Samuel Street as a mere release, according to the view which prevailed in *Acre v. Livingstone*, 26 U. C. R. 282, it had sufficient to operate upon, and was therefore effectual as such release.

Samuel Street must, therefore, be held to have been seised in fee of the east half of lot 17 in the 4th concession of the township of King.

The deed from Thomas C. Street to Simeon Draper purported to convey to Simeon Draper the south half of the lot, and as there is no other description of the land in the deed, the south half only must be held to be what was intended to be conveyed, and the same description of the land is used in all the deeds conveying the land down to and including the deed to McKay.

The deed from Ledenter to Keen is objected to as being inoperative under the decision of this Court in *Acre v.*

Judgment.
ARMOUR,
C.J.

Judgment.

**ARMOUR,
C. J.**

Livingstone, and it must be so held if *Acre v. Livingstone* is to govern our decision.

If we follow *Acre v. Livingstone*, our decision will amount to this that, although Ledenter intended to convey the lands mentioned in that deed to Keen, the deed for that purpose solemnly executed by Ledenter was only waste paper, and the \$4,000 received by Ledenter from Keen and paid by Keen to Ledenter was received and paid for the delivery by the former to the latter of this piece of waste paper only.

This is a conclusion at which we should not arrive without being driven to it by inevitable necessity, and we think we should decline to follow the decision of this Court in that case.

Acre v. Livingstone was decided by a majority of this Court only, and was a direct reversal of *Nicholson v. Dilabough*, 21 U. C. R. 591, notwithstanding the attempt made to distinguish it from that case, and dissent in its decision was expressed by Strong, V.C., in *Collver v. Shaw*, 19 Gr. 599.

If the deed held to be inoperative in *Acre v. Livingstone* had instead thereof been held to be operative, and we had been of opinion that it was inoperative, we would certainly have followed such a decision, because conveyancers on the faith of such a decision would have gone on using similar deeds for the purpose of conveying lands, and the titles to lands would have become dependent on the validity of such deeds as conveyances, and we would be doing mischief in overruling it: *Doe Otley v. Manning*, 9 East at p. 71; *Davidson v. Sinclair*, 3 App. Cas. at p. 788; *Brownlie v. Campbell*, 5 App. Cas. at p. 948; *Campbell v. Campbell*, 5 App. Cas. at p. 815; *Dalton v. Angus*, 6 App. Cas. at p. 812; *Caldwell v. McLaren*, 9 App. Cas. at p. 409; *Bain v. Fothergill*, L. R. 7 H. L. at p. 209.

But the effect of the decision in *Acre v. Livingstone* was to prevent conveyancers using similar deeds to that thereby held inoperative for the purpose of conveying lands, and no mischief can, therefore, be worked by our overruling it.

We agree with the judgment of the dissenting Judge in that case, in holding that since the statute 14 & 15 Vic. ch. 7, sec. 2, the words "remise, release, and quit claim" may operate as a grant. Judgment.
ARMOUR,
C.J.

In *Spears v. Miller*, 32 C. P. 661, it was held that "demise" would operate to convey the fee; and it is difficult to understand why "remise" may not do so.

The words "limit and appoint" have also been held to operate as a grant: *Shove v. Pincke*, 5 T. R. 124; *Perry v. Watts*, 3 M. & G. 775; *MacAndrew v. Gallagher*, 8 Ir. Rep. Eq. 490.

The rules for the construction of deeds are laid down in many cases to which we need do no more than refer, and uniformly include this, that a deed shall never be void where the words may be applied to any intent to make it good: *Throckmerton v. Tracy*, 1 Plowd. 160; *Parkhurst v. Smith*, Willes' 327; *Cholmondeley v. Clinton*, 2 J. & W. 91.

And we think that whether before or since the statute 14 & 15 Vic. ch. 7, sec. 2, a deed such as that in *Acre v. Livingstone* and the one we are considering would operate as a bargain and sale.

In *Jackson v. Alexander*, decided in the Supreme Court of New York, Kent being Chief Justice, 3 Johnson 484, the words of the deed were: "For value received of Daniel Hudson & Co., I hereby make over and grant unto the said Daniel Hudson & Co., his heirs and assigns, my right and claim on the public for 600 acres of land;" and it was held that there was sufficient evidence of a consideration appearing on the face of the deed to conclude the grantor, and to give effect to it as a bargain and sale, and that the words "make over and grant" were sufficient to pass the lands by way of use.

In *Jackson v. Fish*, in the same Court, Kent being Chief Justice, 10 Johnson 456, the deed was a deed poll, in which no consideration was stated, but a consideration was proved, and the words used were "remise, release, and forever quit claim" to the grantee, his heirs, &c.; and it was held to be a bargain and sale by the words "remise, release, and forever

Judgment.
ARMOUR,
C.J.

quit claim," and these words were sufficient to raise a trust or use for the benefit of the bargainee; and by the Statute of Uses the use was transferred into possession.

In *Jackson v. Root*, 18 Johnson 60, the words in the deed were, the grantor "for value received makes over and confirms unto the grantees, their heirs, &c., forever;" and the deed was held to operate as a bargain and sale. *Lynch v. Livingston*, 6 N. Y. 422, is to the same effect.

We see no evidence upon which we could hold that the defendant Mulholland had any such possession of the north-east quarter of the lot as would extinguish the title of the true owner: *Harris v. Mudie*, 7 A. R. 414. And as to the south-east quarter of the lot, Richard Harman was in possession of that, or of a part of it, as a tenant at will to Keen, and the defendant did not get possession of that till he procured Harman to execute the lease of October 1st, 1872, and then we find him by the agreement made with McKay on the 31st August, 1877, acknowledging McKay's title to it, and there was therefore no such possession of the south-east quarter as would extinguish the title of the true owner.

The deed from Messrs. Fuller and Miller to Dennis B. Pearson of the 24th October, 1877, effectually conveyed the north-east quarter of the lot, of which Thomas C. Street had not divested himself, to Dennis B. Pearson in fee.

We are not called upon to place a construction upon what was intended to be conveyed by the deed from John McLean to the defendant Mulholland, but we think that if we were, we should probably hold that it did not convey any part of the east half of the lot.

We think that the plaintiff is entitled to recover the land in question, and that this motion must be dismissed with costs.

[See *Mulholland v. Harman*, 6 O. R. 546, where the same title was in question.]

[QUEEN'S BENCH DIVISION.]

WYLIE V. FRAMPTON.

Husband and wife—Conveyance of real estate by married woman—Necessity for joining husband—Tenancy by the curtesy initiate—R. S. O. ch. 132, sec. 4, sub-secs. 2, 3—Order under 51 Vic. ch. 21, (O.)

In an action for specific performance by a married woman, the question was whether the husband of the plaintiff was entitled to a tenancy by the curtesy initiate in certain land of the plaintiff which she agreed to sell to the defendant, so as to require the joining of the husband in the conveyance.

The marriage took place in 1867, and issue had been born alive. The land was acquired by the plaintiff, one portion in 1879, and the remainder in 1882.

Held, that the case was governed by R. S. O. 1877, ch. 125, secs. 3 and 4, similar to sub-secs. 2 and 3 of sec. 4 of R. S. O. 1887, ch. 132, and the land could not be conveyed by the plaintiff alone, unless by virtue of an order under 51 Vic. ch. 21 (O.), so as to give the purchaser a title free from the husband's claim; and under the circumstances of this case such an order was made.

Semble, the wife alone could convey her own estate in the land. *Re Konkle*, 14 O. R. 183, and *Adams v. Loomis*, 24 Gr. 242, considered.

THIS was an action brought by a married woman, to Statement. recover possession of part of lot 5 on the north side of Queen street, in the town of Parkdale.

By an agreement under seal dated 1st June, 1886, the defendant agreed to purchase from the plaintiff the land in question for \$4,250, \$50 of which was to be paid in cash, \$800 on the 15th August, 1886, with interest at six and one-half per cent. from the 1st June, and the balance of \$3,400 was to be secured by a mortgage. In the agreement the defendant covenanted to pay the purchase money in this way and all taxes charged on the land after 1st January, 1886; and payment of the purchase money was made a condition precedent to the defendant's right to receive a conveyance, upon payment of which the plaintiff covenanted to then immediately convey to the defendant; and it was also provided that the defendant should be permitted to occupy the land until default in payment, subject to voluntary or permissive waste. It was also provided by the agreement that time should be of the essence, and unless the payments were punctually made the agreement

Statement. should be void and the plaintiff should be at liberty to resell.

The action was begun on the 20th June, 1888.

The statement of claim set forth the agreement, and alleged that the defendant had gone into actual possession under it, but had not paid the \$800, and notwithstanding that such payment was made a condition precedent to a conveyance, the plaintiff had tendered the defendant a conveyance, which he refused to receive.

The defendant by his statement of defence admitted the agreement, and said he had accepted the title and was and always had been ready to pay the purchase money. He alleged that the plaintiff was married before the 1st of January, 1872; that she acquired the land in question, part on the 29th of April, 1879, and the remainder on the 14th of October, 1882; that issue of her marriage had been born alive; and that her husband was tenant by the curtesy initiate of the land. He submitted that the conveyance tendered by the plaintiff, being executed by herself alone, was not a good conveyance of the land, and claimed that the plaintiff should be ordered to specifically perform the agreement by conveying the land to the defendant by a good and sufficient deed in fee simple freed from any estate of her husband therein.

The action was tried before ROSE, J., without a jury, at the Toronto Assizes, on the 24th April, 1889.

Upon the evidence taken the learned Judge was of opinion that an order should be made under 51 Vic. ch. 21, sec. 2, (O.) enabling the plaintiff to convey the land freed from her husband's estate.

In order to determine the question of costs of the action, it was necessary to decide whether the defendant was justified in refusing the conveyance executed by the wife alone, and this question was then argued.

Schoff, for the plaintiff. The defendant knew that the estate belonged to the wife, and cannot compel the husband to convey his interest: *Castle v. Wilkinson*, L. R. 5

Ch. 534; *Barnes v. Wood*, L. R. 8 Eq. 424. The defendant **Argument** is in possession under an agreement to purchase, and on default can be ejected without notice or demand: *Doe Sheriff v. McGilveray*, 6 O. S. 294; *Doe Kemp v. Garner*, 1 U. C. R. 39; *Doe Stodders v. Trotter*, 1 U. C. R. 310; *Doe Phillpotts v. Crouch*, 5 U. C. R. 453; *Robertson v. Slattery*, 10 U. C. R. 498; *Stringham v. Ammerman*, 14 U. C. R. 548; *Robinson v. Smith*, 17 U. C. R. 218; *Prince v. Moore*, 14 C. P. 349. On the question of the position of a married woman in regard to her lands, I refer to *Bryson v. Ontario and Quebec R. W. Co.*, 8 O. R. 380; *Re Gracey and Toronto Real Estate Co.*, 16 O. R. 226; *Re Konkle*, 14 O. R. 183; *McCrae v. Backer*, 9 O. R. 1; *Adams v. Loomis*, 24 Gr. 242. The defendant here is seeking specific performance, and should have come to the Court promptly: *Eads v. Williams*, 4 D. M. & G. at p. 691; *Spurrier v. Hancock*, 4 Ves. 667; *Hook v. McQueen*, 4 Gr. 231; *McArthur v. Reginam*, 10 O. R. 191; *Re Craig*, 10 P. R. 33.

E. D. Armour, for the defendant It is admitted that if this land is separate estate, the wife can make a valid disposition without her husband joining; for, though the husband is entitled to curtesy in his wife's separate estate, the wife may divest him of it by her own conveyance; it being of the essence of the separate estate that she should have freedom to convey separate from her husband: *Cooper v. Macdonald*, 7 Ch. D. 288. If it is not separate estate, then the wife cannot divest the husband of his estate by the curtesy, except by order of a Judge of the High Court.

In this case we admit that the wife can make a valid disposition of her own estate in the land; but we are entitled to the whole fee simple unincumbered; because, first, it is of the essence of the contract that we should have it: compare *VanNorman v. Beaupre*, 5 Gr. 599; also *Loughead v. Stubbs*, 27 Gr. 387, where it was held that an agreement to sell land means to sell free from dower, and the wife must bar; and secondly, because this contract contained a covenant by the vendor to convey by statutory convey-

Argument.

ance with the usual covenants in deeds under the statutory form. These covenants comprise a covenant for further assurance and a covenant for quiet enjoyment; and it is clear that, if the husband survived, the wife's heirs would be bound to procure a further assurance from him in order to establish us in our title, and would have to defend us from any disturbance by him. Therefore, we have, in addition to the presumption of law, the express covenant that we shall never be disturbed in this land. We are not bound to take the risk of being disturbed, and we are therefore entitled now to get in the husband's interest.

We contend that this is not separate estate; and, therefore, that the husband's estate by the curtesy cannot be divested, except as aforesaid, for the following reasons: Mrs. Wylie was married in 1867, and before the Married Womens' Act of 1872. If she had acquired the property between 1872 and 1877, we admit that it would have been separate estate, notwithstanding her marriage before the Act; but the Revised Statutes of 1877, ch. 525, made an alteration in the law, by section 4 of which statutory separate estate was confined to those women who were married after 2nd March, 1872.

Mrs. Wylie falls under sec. 3, having been married between 5th May, 1859, and 2nd March, 1872; and, therefore, she holds her property under sec. 3, because both lots were acquired while the Revised Statutes of 1877 were in force; namely, one parcel on 29th April, 1870; the other on 14th October, 1882.

Section 3 is a transcription of the Consolidated Statutes of 1859; and it was decided in *Ogden v. McArthur*, 36 U. C. R. 246, that the husband must not only join, but must join as a granting party. See also *Furness v. Mitchell*, 3 A. R. 510, in which the Court of Appeal shewed clearly that the husband's estate by the curtesy remains in many cases, and that it is only in cases of separate estate that the wife can convey without the husband. The law remained in this way until the statute of 1884; but, as the estate of the husband had become vested, the Act of 1884 did not divest it. See 47 Vic. ch. 19, sec. 22 (O.)

In *Re Coulter and Smith*, 8 O.R. 536, it was argued that ^{Argument.} this Act allowed all married women to convey free from their husbands. The learned Judge held there that in that case the wife could convey free from her husband; but examination of the dates of the marriage and the acquisition of the property will shew that the property was acquired while the Act of 1872 was in force, and was therefore separate estate, and the case therefore falls exactly within the principle of *Bryson v Ontario & Quebec R. W. Co.*, 8 O. R. 380.

Re Konkle, 14 O. R. 183, was a case where the land was conveyed to the wife in lieu of alimony, or as a similar provision, and the essence of such an arrangement is that the wife should have complete control, such as she has over her separate estate proper. The explanation of this case is found in *Adams v. Loomis*, 24 Gr. 242.

Attention is called to the Devolution of Estates Act, which recognizes the existence of estate by the curtesy, and allows the husband to elect between that and his share in the estate: R. S. O. ch. 108, sec. 4, sub-sec. 3; also to 51 Vic. ch. 21, sec. 2, (O.), which enables a Judge of the High Court to order a conveyance by the wife alone free from any estate of the husband by the curtesy. This was not in the old Act, by which a Judge was authorized to make such an order, and was expressly inserted in order to enable her to divest the husband of curtesy if she made a proper case for it.

As to the proceeding. All the recent cases heretofore have arisen upon vendor and purchaser petitions; such as *Re Coulter and Smith*; *Re Konkle*; *Re Gracey*, *supra*; therefore, the plaintiff should pay all costs of unnecessary proceedings. She might also have elected to proceed by obtaining a Judge's order for a conveyance at any time since the Statute of 1888, and would thus have saved all the costs. In any event, therefore, we are entitled to the costs of unnecessary proceedings; but we claim the whole costs of the action to be deducted from the purchase money.

Judgment. May 17, 1889. ROSE, J. :—

ROSE, J.

The question which the parties came down to try, indeed the only one, was whether the husband of Mrs. Wylie was entitled to a tenancy by the curtesy in the lands in question, so as to require his being joined in the conveyance, or to require an order under 51 Vic. ch. 21, (O.)

The marriage took place in 1867, and the property was acquired, one parcel on 29th April, 1879, and the other on 14th October, 1882.

The case is, therefore, governed by the law as found in R. S. O., 1877, ch. 125, secs. 3 and 4, and in the same words in sub secs. 2 and 3 of sec. 4 of R. S. O., 1887, ch. 132.

By sub-sec. 3 tenancy by the curtesy was abolished in certain cases; that is, a woman married after the 2nd of March, 1872, was enabled to convey her estate by deed *inter vivos* or by will, freed from any claim by her husband.

But sub-secs. 2 and 3 shew that this provision does not extend to marriages contracted prior to the 2nd March, 1872, and subsequent to the 5th May, 1859.

In my opinion the lands in question could not be conveyed by Mrs. Wylie alone, unless under an order, so as to give the purchaser a title free from her husband's claim, although probably she could convey her own estate.

The provisions of 47 Vic. ch. 19, sec. 5, are to be found in ch. 132 as sec. 7, but by express words are confined to property acquired after 1st July, 1884, and so have no application in this case.

But whatever may be the power given to a married woman to convey her own property, nowhere is any power given to her to convey away her husband's estate or interest, or to deprive him of it by her conveyance where she was married prior to 1872, and acquired the property after 1877, save as provided by 51 Vic. ch. 21, (O.)

Mr. Schoff referred to *Re Konkle*, 14 O. R. 183. An examination of the authorities referred to in the report will shew that the key to the decision in that case will be found in *Adams v. Loomis*, 24 Gr. 242.

At the close of the argument I said I would make an order under 51 Vic. ch. 21, sec. 2 (O.), to enable the plaintiff to convey the land freed from her husband's estate, the reasons given to me by the plaintiff in the witness box appearing to me to be quite sufficient to give jurisdiction.

Judgment.
ROSS, J.

In fact, therefore, the only remaining question was that of costs, which, I think, the plaintiff must bear. I cannot but express regret at the expensive proceeding adopted to bring this question before the Court, when an application might have been made under the Vendors and Purchasers Act ; or the plaintiff might have applied for a Judge's order under 51 Vic. ch. 21.

Even if I had decided the question raised in the plaintiff's favour, I would have felt constrained to make her pay the costs of the unnecessary proceedings.

I think I ought to acknowledge the great assistance I have derived from Mr. Armour's very carefully prepared argument reviewing the various statutes and authorities on the question, thus saving me much time and labour.

The claim will be dismissed with costs, and the counter-claim for specific performance allowed with costs.

[QUEEN'S BENCH DIVISION.]

RE CROFT AND THE TOWN OF PETERBOROUGH.

Municipal corporations—By-law—Submission to electors—Liquor License Act, R. S. O. ch. 194, sec. 42—"Electors," meaning of.

Sec. 42 of the Liquor License Act, R. S. O. ch. 194, provides for the council of any municipality passing a by-law requiring a larger duty to be paid for tavern or shop licenses than is imposed by sec. 41, "but not in excess of \$200 in the whole, unless the by-law has been approved by the electors in the manner provided by the Municipal Act, with respect to by-laws which before their final passing require the assent of the electors of the municipality."

A municipal council having submitted to the electors and passed a by-law providing for a larger duty than \$200, a motion was made to quash it on the ground that certain leaseholders had not been allowed to vote upon it, it being assumed by the council that sec. 309 of the Municipal Act, R. S. O. ch. 184, governed as to the votes of leaseholders.

Held, that sec. 309 did not apply; and that the word "electors" in sec. 42 must be read as referring to the same class as "electors" in sub-sec. 14 of sec. 11 of R. S. O. ch. 194, viz., those entitled to vote at an election for a member of the Legislative Assembly; and the reference to the Municipal Act in sec. 42 must be confined to the manner of holding the election.

The by-law, not having been submitted to or approved by the electors according to this interpretation of the statute, was quashed with costs.

Statement.

THIS was a motion to quash by-law No. 545 of the town of Peterborough, fixing the fees to be paid for licenses to sell intoxicating liquors in the town of Peterborough.

The grounds of the motion appear in the judgment.

June 7, 1889. The motion was argued before ROSE, J., in Court.

Poussette, Q.C., for the motion.

E. B. Edwards, contra.

June 8, 1889. ROSE, J.:—

The sole question is, what leaseholders were entitled to vote upon the question of passing a by-law for the town of Peterborough under sec. 42 of the Liquor License Act, ch. 194, R. S. O. 1887. The section reads as follows: "The

council of any municipality may by by-law to be passed before the 1st of March in any year, require a larger duty to be paid for tavern or shop licenses therein, but not in excess of \$200 in the whole, unless the by-law has been approved by the electors in the manner provided by the Municipal Act with respect to by-laws which before their final passing require the assent of the electors of the municipality."

Judgment.

Ross, J.

The by-law No. 545 provided as follows: "For each tavern license, \$400; for each shop license, \$300; for each tavern license without the necessary accommodation, \$600."

The instructions given to the deputy-returning officers were to accept the votes of "(1) all freeholders; (2) all tenants or householders whose leases cover the period from the date of the vote to April 30, 1890."

This was, as I understand it, on the assumption that sec. 309 of the Municipal Act, R. S. O. ch. 184, governed as to leaseholders, and that no leaseholder was qualified to vote unless his lease extended for at least a year, within which time the first license fees would be paid.

I do not see how that section applies. It was not passed with reference to any by-law for raising a revenue, as the by-law in question, but for imposing a rate. The language is quite inapplicable to a by-law such as the one we are considering.

It was contended on behalf of the applicant that sec. 79 of the Municipal Act applied, by which the right of voting at municipal elections is given to "all residents of the municipality who have resided therein for one month next before the election, and who are, or whose wives are, at the date of the election, householders or tenants in the municipality."

I cannot adopt such argument for the reasons following:

Upon looking at the various sections of ch. 194, I observe that sec. 11, sub-sec. 14, provides that "No license shall be granted to any applicant for premises not then under license or shall be transferred to such premises if a majority of the persons duly qualified to vote as electors

Judgment. in the sub-division at an election for a member of the
ROSE, J Legislative Assembly, petition against it," &c.

I think that I must read "electors" in that sub-sec. and in sec. 42 as referring to the same class; and full effect can then be given to the language of sec. 42 by confining the application of the clauses of the Municipal Act to "the manner" of holding the election.

And I come to this conclusion the more readily as the subject legislated upon by the Liquor License Act is rather one of morals and police regulation than of finance, and so all residents in the municipality have an interest in the question, whether they be property owners or not.

Reference to sec. 5 of ch. 106, R. S. C., the Canada Temperance Act, shews that "electors" in the voting to be had under such Act is a term meaning "electors qualified and competent to vote at the election of a member of the House of Commons."

It is clear that if I have arrived at the right conclusion, the by-law in question has not been submitted to the electors, and they have not had an opportunity to vote upon it, and so it has not been approved by the electors, and must be quashed. See *Re Fenton and Simcoe*, 10 O. R. 27.

The order will be with costs.

[QUEEN'S BENCH DIVISION.]

O'NEILL ET AL. V. OWEN ET AL.

Will—Execution—Attestation—“ Dependent relative revocation ”—Devise to infants—Conveyances by heirs-at-law—Registration—Priorities—R. S. O. 1877, ch. 111, sec. 75—“ Inevitable difficulty ”—Crops—Possession—Conts.

The plaintiffs were the devisees of the land in question in this action under the will of H. O'N. ; the defendant A. O'N., the father of the plaintiffs, was one of the heirs-at-law, and had obtained conveyances of the land from the other heirs-at-law, of H. O'N. ; and the defendant O. was the assignee of all the estate of A. O'N., and had besides a mortgage from A. O'N. on the land in question.

On the 17th April, 1877, H. O'N. signed a will in the presence of one witness ; another witness was then called in, before whom the testator acknowledged his signature, and then both witnesses signed in the presence of the testator and of each other. On the 23rd April, 1877, the testator, desiring to have two changes made, caused two of the sheets of the will to be re-written and read to him ; the two new sheets were then put into the place of the old ones, the document pinned together, and on the last sheet, which was not one of those re-written, the date 17th was changed to 23rd ; the same witnesses were then called in, and the testator then acknowledged his signature to the will, and each of the two witnesses his. The two sheets taken out of the will were afterwards destroyed by one H., by the direction of the testator, but not in his presence. The testator died a few days after this without having made any other will. The will of the 23rd April was offered for probate, but was refused by a Surrogate Court.

Held, that the will of the 17th April was duly executed ; but that the will of the 23rd April was not duly executed, and probate was properly refused ; and the will of the 17th April was not revoked by the destruction of the two sheets out of the presence of the testator, nor by the defective execution of the will of the 23rd April, the intention of the testator not being to cancel the whole of the earlier will, but only to make two changes in it, and he being under the belief that the later will was a valid one ; and it was adjudged that the earlier will should be admitted to probate.

By this will the plaintiffs were to come into possession when they should become of the age of 21 years, not being less than 12 years from the date of the testator's death, and they were infants of tender years at the time when, after the death of H. O'N., the defendant A. O'N., their father and guardian, agreed with the other heirs-at-law for the purchase of their shares, on the assumption that H. O'N. had died intestate, and obtained conveyances from them. A. O'N. and the other heirs-at-law were at this time aware of the facts in regard to both the wills, and were also aware that, after probate of the will of the 23rd April had been refused, it was the opinion of the solicitor for the estate that the will of the 17th April was properly executed and that probate might be obtained.

Held, that the plaintiffs' rights were not defeated or prejudiced by the agreement and conveyances referred to ; nor were the plaintiffs' rights defeated by the registration of the conveyances to A. O'N. and his assignment and mortgage to O. ; for A. O'N. had actual notice and knowledge of the plaintiffs' rights ; and that the plaintiffs, who were

not guilty of any wilful neglect or default, were prevented from registering the will by "inevitable difficulty" or "impediment" within the meaning of R. S. O. 1877, ch. 111, sec. 75.

The defendant O. by a counter-claim asked for damages, being the value of a crop in the ground and deprivation of possession of the land for a year or more, but a reference to assess these damages was refused.

The plaintiffs and the defendant O. were allowed costs out of the estate except that the defendant O. was ordered to pay the costs occasioned by charges made by him of fraud and collusion; no costs were allowed to or against the defendant A. O'N.

McLeod v. Truax, 5 O. S. 435, specially observed upon.

Statement. THIS action was tried at the Autumn Chancery Division Sittings at London in 1888, before FERGUSON, J., who reserved judgment.

W. R. Meredith, Q.C., and T. G. Meredith, for the plaintiffs.

M. D. Fraser and R. M. Meredith, for the defendant Owen.

The defendant Albert O'Neill in person.

The facts sufficiently appear in the judgment.

December 7, 1888. FERGUSON, J.:—

The statement of claim is that one Harvey O'Neill, being seised in fee simple in possession of lots 24 and 25 in the 3rd concession of the township of East Williams, in the month of April, 1877, duly made and published his last will, which was executed and made according to law for the passing of real estate in this Province, whereby he gave and devised these lands to the plaintiffs, the same to be divided from east to west, and to come into their possession when they should become of the full age of twenty-one years not being less than twelve years from the date of the decease of the testator; that the testator departed this life on or about the 9th day of May, 1877, without having in any manner altered or revoked the said will; that the plaintiffs have attained their majority, the younger of them, John O'Neill, having attained his majority on the 23rd March, 1888; that the defendant Albert O'Neill, the father of the plaintiffs, pretending that the said late Harvey O'Neill died intestate, but having full notice and knowledge

of the making of the said will at the time of the making thereof, and of the plaintiffs' rights thereunder, procured a conveyance to be made to himself from the other heirs-at-law of the said Harvey O'Neill of these lands, and thereafter conveyed the same by way of mortgage to the Huron and Erie Savings and Loan Company by indenture dated 29th March, 1884, to secure the payment of \$3,500 and interest, and afterwards by another indenture dated 7th October, 1886, to secure the payment of \$800 and interest, and that these indentures were duly registered in the proper registry office; that there is due the said company on the footing of these mortgages \$4,000, and upwards; that on the 30th November, 1887, the defendant Albert O'Neill made an assignment of all his estate and effects to the defendant Owen under the provisions of the statute, and that the defendant Owen claims to be the owner of these lands by virtue of such assignment, and has caused the same to be duly registered in the proper office; and that the defendant Albert O'Neill is in the possession of the lands. The claim is to have this will established by the judgment of the Court; to have an order for possession of the lands; an order for the payment off by the defendant Albert O'Neill of the said two mortgages; a declaration that the conveyance from the other heirs-at-law of the said Harvey O'Neill to the defendant Albert O'Neill passed no title or interest to or in the lands, and that the registration of the same be vacated; a declaration that the plaintiffs are entitled to rank upon the estate of the defendant Albert O'Neill assigned to the defendant Owen, as creditors for the amount required to pay off the mortgages; and the plaintiffs ask general relief and costs.

The defendant Owen sets up in his defence the assignment to him of the equity of redemption in the lands by the assignment for the benefit of creditors before mentioned, and the registration of the same; also a mortgage from the defendant Albert O'Neill to him dated the 12th November, 1887, to secure the payment of \$600 and upwards, and the registration of the same, and claims the benefit of the

Judgment. Registry Act and laws of the Province respecting the
FERGUSON, J. registration of instruments relating to land.

This defendant also sets up an application to the Surrogate Court in the year 1887, to establish the will in question and obtain probate thereof, or for letters of administration with the will annexed, and an adjudication in that Court that the will was invalid, and the refusal of probate or such letters of administration, stating that thereupon and upon the faith thereof the defendant Albert O'Neill purchased for valuable consideration the lands in question from the heirs-at-law of the alleged testator, with the knowledge and approval of the plaintiffs, and setting up that Albert O'Neill was a purchaser for value without notice of the plaintiffs' claim, and that he, the defendant Owen, is also a purchaser for value without notice. He also says that the plaintiffs never pretended to have any claim in respect of the said lands till after the assignment by the defendant Albert O'Neill for the benefit of his creditors.

The defendant Owen also states that the plaintiffs' claim is made in collusion with the defendant Albert O'Neill for the purpose of depriving the creditors of the latter of the benefit of the said assignment, adding that the debts were contracted and the credits given on the faith of Albert O'Neill being the owner of this land, and this to the knowledge of the plaintiffs, who stood by and permitted and assented to the same being done. He also says that by collusion between the plaintiffs and the defendant Albert O'Neill they have obtained and retained possession of the lands, and refused to give up the possession thereof to him, and prevent him from taking possession thereof, or having any of the rents and profits thereof, and are taking such rents and profits and appropriating them to their own use. And he claims by way of counter-claim possession of the land and mesne profits or damages for the detention of the same.

The plaintiffs take issue on this statement of defence, deny the allegations contained in the counter-claim, and by way

of reply say that the defendant Owen when he advanced the money (if he did make any advance) to the defendant ^{Judgment.} FERGUSON, J. Albert O'Neill, had actual notice of the will under which the plaintiffs claim, and of their rights thereunder. And they further say that the defendant Owen is not entitled to set up against them the provisions of the Registry Act, because, as the fact is, the plaintiffs were disabled from registering the will within twelve months after the death of the testator, and that they have been so disabled from the time of his death hitherto by "inevitable difficulty," without their or either of their wilful neglect or default, that is to say, by reason of the will having been partly destroyed by the testator under such circumstances as did not in law operate as a revocation of the same, but made it impossible to register it.

The defendant Albert O'Neill, present in person, submitted to such judgment as the Court might see fit to pronounce.

The mortgagees under the title against the will, namely, the Huron and Erie Savings and Loan Company, are not parties to the action. At the trial there was some discussion as to this. The matter is now, however, set at rest by the plaintiffs' counsel assenting to take no relief against them now or hereafter, and that, as far as the plaintiffs are concerned, their mortgages (that is, the mortgages in favour of the Huron and Erie Company) are to be and stand as good mortgages.

The matter first to be considered is as to the alleged will; for if there was not a good will, the plaintiffs' contention must fail, and their action should be dismissed.

The witness John Hughes says that he knew Harvey O'Neill for fifteen years before his death, and that he resided on the lands in question before and at the time he died; that he himself was a general storekeeper at Ailsa Craig, and remained there till the year 1879, when he went to Detroit, and that he finally moved to Brandon, Manitoba, where he now resides. He says that he saw Harvey O'Neill on the 17th, 21st, and 23rd days of April,

Judgment. 1877. He says he was sent for, and on the 17th April, **FERGUSON, J.** 1877, he went to Harvey O'Neill's house, and met one Nevill there; that Nevill was a storekeeper, who also drew up papers as part of his business; that Harvey O'Neill told him that he wanted him to be an executor of his will; that Harvey O'Neill was afflicted with consumption; that Nevill was writing a will when he (the witness) arrived, and that when it was completed Harvey O'Neill signed it in presence of Nevill; that another witness was called in, and that Harvey O'Neill then acknowledged the signature, and that then both the witnesses signed in the presence of the testator. He said that the paper produced from the Surrogate Court (he looking at the last page of it) was the one that was signed; that he was aware of the contents of the will that was so signed on the 17th of April; that he was one of the executors; and that Jones and Stewart were the other executors. He says that on the 21st of April he was sent for again, and he went to Harvey O'Neill's place, and saw him, when he said that he wanted him (the witness) to change \$3,000, a gift that he had made by the will to Melville O'Neill, into a gift of \$2,000, and to strike out a gift of \$300 which he had made in favour of the executors; that he did not attempt to make these changes, but told the testator that it was better to have the "writer of the will; that he assented to this, and requested him to take Nevill to him on the 23rd of April, which he did, and that the testator told Nevill in his presence, that is, in presence of the witness, that he wanted these two changes made in the will; that Nevill told the testator that it would be better to re-write the sheets to save erasures, and that Nevill re-wrote one sheet changing the \$3,000 to \$2,000, and re-wrote another sheet leaving out the \$300 to the executors. He says that Nevill wanted to write the last sheet of the will over again, but the testator thought this unnecessary, and that there would be more trouble to sign the will again than if this were not done. He says that after the two sheets had been rewritten they were read in his presence; that he held the original

sheets, and Nevill read the new ones, and that they were ^{Judgment.} alike excepting these two changes; that the two new ^{FERGUSON, J.} sheets were then put into the place of the two old ones, and the document pinned together, and that on the last sheet the date 17th was changed to 23rd. He says that the same witnesses were then called in, and that Harvey O'Neill then acknowledged his signature to the will, and each of the two witnesses acknowledged his signature to it, each placing his finger upon the signature, &c. He says that the two sheets taken out of the will were given to him (the witness), and that Harvey O'Neill (the testator) told him to destroy them, but not in his presence, by which I understand that the direction to destroy did not extend to destruction in the testator's presence, but only to destruction. He says his impression is that he did destroy them in the testator's house, but not in his presence, but by his direction. He says the new will was kept by him at the testator's request; that he took it to the testator's place the day of the funeral, and read it there in presence of the testator's brothers and sisters—"all the family." He says that no other reason was given for destroying the two sheets and re-writing them than these he has mentioned. He says that the executors made application for probate of the will, and that it was refused in May, 1877; that at the time of that application he gave the will to Mr. Goodman, the solicitor acting for the executors, and did not see it afterwards till the time of the trial, and that he does not know where Nevill is now, but he was in Ailsa Craig when he (the witness) left that place.

The application spoken of by the witness was for probate of the will of the 23rd of April, the last one made. In his cross-examination he says that the executors were aware of the question as to whether the will of the 17th of April was good or not. He says he was advised that probate of the will of the 17th might be obtained, but he did not take any steps to obtain it because the family of the testator were opposed to it. He explains that by the family he means brothers and sisters, for Harvey O'Neill had no family (children) of his own.

Judgment.

FERGUSON, J. The solicitor Goodman, who had known Nevill for many years, in his evidence says that Nevill resided at Park-hill, and was in financial difficulties, and went to the United States some seven or eight years ago, and is reported to be dead. He also says that the only question before the Surrogate Court was as to the will of the 23rd of April, 1877. He proves the signature of Nevill to the will produced as a witness thereto.

William Jones recollects the will, and that there were two changes made, but he did not see it signed, and cannot state particulars.

The evidence of the learned Judge of the Surrogate Court, taken in connection with the papers placed in his hands, shews that the application for probate had regard to the will of the 23rd of April, and he says there was no application for probate of any former will, and that he has no recollection of any application for administration of the estate.

Henry Topping is the other witness to the will. He is manifestly adverse to the plaintiffs. His evidence, so far as it extends, does not differ from that of Hughes materially. He knows the signatures, and says that the testator asked him to sign; that he did sign as a witness on the 17th of April, and that he did not sign afterwards at all. He attempted to swear and did say that he did not see Nevill, the other witness, sign the will of the 17th April. He afterwards says that Harvey O'Neill asked him to witness the will, and that he signed his name before going out of the room, but that he cannot positively say that Nevill signed while he was in the room. He afterwards says: "I do not know whether Nevill signed in my presence. I will not say whether Nevill signed in my presence or not. Nevill was there when I signed. He was in the room at the time." It was entirely manifest to me that this witness was "fencing," if one may use that term, and I cannot entertain any doubt that both the witnesses to the will signed as witnesses in the presence of the testator, and in presence of one another, all being in the same room at the

time. I mean the will of the 17th of April, and I am of Judgment. the opinion that this is sufficiently proved. I find such to FERGUSON, J. be the fact. The testator signed this will of the 17th of April in presence of one of the witnesses (Nevill). He immediately, or very soon after this, acknowledged his signature to the will in presence of the other witness and of this witness, both present at the time. Whereupon both witnesses signed the will as witnesses thereto in presence of the testator and in presence of one another, all three being then in the same room in the testator's house. I think there is no doubt of this, and I find that such were the facts. I do not desire to be understood as holding it to be absolutely necessary to the validity of the execution that the witnesses should subscribe as witnesses in the presence of one another. In this instance I think there can be no doubt that they did so.

It was conceded by all parties that the will of the 23rd of April was not properly executed, and that probate of it had been properly refused, and looking at the Act that was in force at the time, I think the opinion of and the position taken by the parties in respect of that will was the correct one; for, besides being composed—as was said by the learned Judge in the witness box—of several documents, &c., it was not attested and subscribed by the witnesses in the presence of the testator, as required by the Act, and see *Hindmarsh v. Charlton*, 8 H. L. C. 160.

As to the will of the 17th of April, the one now relied on by the plaintiffs, the Act in force at the time was, I think, the 7th section of the Act of 1873. This section says:

“No will shall be valid unless it shall be in writing, and executed in manner hereinafter mentioned; that is to say, it shall be signed at the foot or end thereof by the testator, or by some other person in his presence, and by his direction; and such signature shall be made or acknowledged by the testator, in the presence of two or more witnesses, present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator; but no form of attestation shall be necessary.”

Judgment.

FERGUSON, J. proved and shewn that this will of the 17th of April was executed as required by law, and that it was immediately after its execution a properly executed will. No question was raised, nor on the evidence could any be raised, as to the capacity of the testator, undue influence, or anything of the kind.

There was much evidence and a good deal of contention as to what had taken place in the Surrogate Court, and in the office of the Surrogate Clerk, but in my opinion I need not refer to this, further than to say that I do not think it was made to appear that any proceeding or anything done there had or took any effect against the validity of the will of the 17th of April. All that was done was in respect of the other will, except some affidavits that were filed but never used, having according to their contents relation to contemplated administration of the estate.

It was, however, contended that, whether or not the will of the 23rd of April was well executed and a good will, the will of the 17th of April had been revoked. The destruction of the two sheets of the will was relied on. The evidence is that these were destroyed by the witness Hughes by the direction of the testator, and, as he thought, on the testator's premises, but not in the presence of the testator. If there were no other reasons against the contention that this operated as a revocation, the fact that the destruction was not in the presence of the testator would appear to be sufficient—see the 17th section of the Wills Act of 1873. But, even if the act of destruction of these sheets had taken place as mentioned in this section, there would not, in my opinion, have been a revocation of the will, though the gifts, or the principal gifts, were contained in the sheets so destroyed.

It is plain from the evidence, and I must find as a fact, that the testator did not intend by the direction that these sheets of the will should be destroyed to cancel the will in toto; and that he then believed that the will of the 23rd of April would be or was a good and valid one, or one properly

executed. It is, I think, entirely plain that what the testator intended was to make the two changes in his will that I have before mentioned, and nothing more, and that the will of the 23rd of April should effectuate these two changes. Judgment.
FERGUSON, J.

The law bearing upon the subject is referred to by Sir James Hannen in the case *Dancer v. Crabb*, L. R. 3 P. & D. at p. 104, where the learned Judge says: "The leading cases on the subject are collected in Williams on Executors, 4th ed., pt. 1, bk. 2, ch. 3, sec. 1, p. 142, and the doctrine of dependent relative revocation is there fully explained and illustrated. The result is thus stated: 'Where the act of cancelling is done with reference to another act meant to be an effectual disposition, it will be a revocation or not according as the relative act is efficacious or not.'"

The learned Judge then refers to the earlier cases, and says: "They enforce under varying circumstances the principle that although the testator does an act which unexplained would be one of revocation, yet if it appear that he did it only as a part of the means of setting up another will, if that end be not accomplished the former will is not revoked;" and further on the learned Judge says: "but if his" (the testator's) "meaning is 'As I have made a fresh will my old one may now be destroyed,' the old will is not revoked if the new one be not in fact made." In the 8th ed. of Williams on Executors, at page 155, it is said: "Cancellation, under the influence of a mistake in point of law, seems to be equally inoperative to revoke, as if made under a mistake of fact." And there a reference is made to the words of Lord Ellenborough in the case *Perrott v. Perrott*, 14 East at p. 440, which are: "If a man cancel his will under the mistake in point of fact, that he has completed another, when he really has not, as was the case in *Hyde v. Hyde*, the cancellation is void: and if he cancel it under the mistake of law that a second will (complete as to the execution) operates upon the property contained in the first; when from some clerical rule it does not; shall this be deemed a valid cancellation?"

The author then proceeds by saying: "The general

Judgment. principle of the above cases was laid down by Lord Alvanley in *Ex p. Lord Ilchester*, 7 Ves. 372, as completely established, that, where it is evident that the testator, though using the means of revocation, could not intend it for any other purpose than to give effect to another disposition, though, if it had been a mere revocation, it would have had effect, yet, the object being only to make way for another disposition, if the instrument cannot have that effect, it shall not be a revocation."

FERGUSON, J.

Plaintiffs' counsel referred to other authorities on the same subject, but I scarcely think it necessary that I should do more than mention the fact here, as I think it clear that the destruction of these sheets under the circumstances, the intention of the testator being as I have found and stated it to be, did not operate a revocation of the will of the 17th of April, the will of the 23rd of April not having been properly executed so as to take effect as a will, and I am of the opinion that the same would have been the effect or result if the destruction had taken place in the presence of the testator.

It was contended on the part of the defence that the rights of the plaintiffs under this will were defeated or became obliterated by reason of an agreement made between their father and his brothers and sisters for the purchase by their father of the shares in the property of his brothers and sisters, on the assumption that Harvey O'Neill had died intestate, and that his brothers and sisters inherited the property under the provisions of the Act commonly known as the Act abolishing primogeniture, and the conveyances that were made in pursuance of that agreement.

At the time that agreement and such conveyances were made the plaintiffs were infants of tender years. Their father and his brothers and sisters were aware of the facts in regard to both of the wills. Goodman, who was acting as solicitor for the executors, wanted to apply for probate of the will of the 17th of April, after probate of the other had been refused; but, as he says, his clients would not

let him do so. The witness Hughes says that he was advised that probate of the will of the 17th April might be obtained; but he did not take any steps to obtain it, because the family of Harvey O'Neill were opposed to it; that most of the brothers and sisters (by which was meant most of Harvey O'Neill's brothers and sisters) were opposed to it. I may here remark that, in my opinion, the witness Hughes was a very candid and intelligent witness, one in whom full reliance could be and should be placed; and I think it a well grounded conclusion and a proper finding upon the evidence bearing upon the subject to say that the plaintiffs' father and his brothers and sisters had, in addition to the knowledge of the facts surrounding the will of the 17th of April, knowledge that the solicitor who was acting for the estate of the then late Harvey O'Neill was, after the refusal of probate of the will of the 23rd April, of the opinion that the will of the 17th April was a properly executed will, and that probate of it might be obtained. It may be said that there is not direct evidence in words that each and every one of the brothers and sisters of Harvey O'Neill had knowledge of the latter fact; but, using and exercising common knowledge of the way in which matters of the kind are treated and discussed in families, in connection with the evidence that was given on the subject, one can scarcely conceive how any of them was or remained in ignorance of it. I think it fair to attribute to them full notice of the fact that I have referred to, and I think any reasonable jury would find in this way. It may well be that they thought that the will of the 17th April would forever remain in abeyance, or were of the opinion that probate of it would with difficulty be obtained, or perhaps not at all; but with such notice and knowledge of it, and regarding it as I have endeavored to state, they thought proper to ignore any rights that the plaintiffs had or might have under this will, and take unto themselves the property and make the agreement and conveyances that have been referred to. At this time the plaintiffs were infants, aged about ten and twelve years, and the

Judgment. interest of their father—who, in the argument, was said
FERGUSON, J. to be their guardian—was diametrically opposed to their interests. How, under such circumstances, it can be successfully contended that the fact of the making of this agreement, followed by the conveyances to the plaintiffs father, the defendant Albert O'Neill, had the effect of defeating whatever rights the plaintiffs had under the will I am not able to perceive, and I am of the opinion that such was not the effect; that is, that the plaintiffs' rights were not defeated or affected prejudicially by this agreement, &c.

Then it was contended that the plaintiffs' rights under this will were defeated by the provisions of the Registry Act, by reason of the conveyances to the plaintiffs' father by his brothers and sisters; he and they, as I understand, professing to be co-heirs and heiresses of the late Harvey O'Neill, and the registration of the assignment for the benefit of creditors from the plaintiffs' father to the defendant Owen; these instruments, as it is contended, having gained priority over the rights under the will, which has not yet been registered.

As regards the conveyances to Albert O'Neill, the plaintiffs' father, from his brothers and sisters, these appear to have been for valuable consideration. Yet it appears to me to be a sufficient answer to the contention, if there were none other, to say, as I found to be the fact, that at the time of the taking and registering these conveyances he, Albert O'Neill, had actual notice and knowledge of the facts concerning the will under which the plaintiffs claim, and of their rights in the premises. I do not see how under such circumstances he could gain priority over the plaintiffs under the provisions of the R. S. O., 1877, ch. 111, sec. 74, or the Acts of which this section is composed.

As to the registration of the assignment to the defendant Owen, it was decided in the case of *Collver v. Shaw*, 19 Gr. 599, by Mr. Justice Strong, that an assignee in insolvency could not acquire priority over a prior vendee of the insolvent by prior registration of the instrument appointing him such assignee.

The fourth section of the Act under which this assignment was made, (R. S. O. ch. 114) provides that the assignment, when expressed as required by the Act, shall vest in the assignee all the real and personal estate, rights, property, credits and effects, whether vested or contingent belonging at the time of the assignment to the assignor, except, &c., * * subject, however, as regards lands, to the provisions of the registry law as to the registration of the assignment. Owing, however, to the view that I entertain as to another element of the case, I need not, I think, determine anything as to the meaning of the last clause of this section.

Judgment.
FERGUSON, J.

On the question of priority of registration and the advantages to be gained and disadvantages to be suffered thereby, counsel for the plaintiffs placed reliance on ch. 111, sec. 75, R. S. O., 1877, the same as 31 Vic. ch. 20, sec. 65, providing that in case the devisee, or other person interested in the lands devised in a will, is disabled from registering the same by reason of the contesting of the will or by any other inevitable difficulty without his or her wilful neglect or default, then the registration of the same within the space of twelve months next after his or her attainment of such will or probate thereof, or the removal of the impediment aforesaid, shall be a sufficient registration within the meaning of the Act.

In the case *McLeod v. Truax*, 5 O. S. 455, it was held that infancy was not an "inevitable difficulty" within the 15th section of the then Registry Act, so as to preclude the necessity of an infant devisee registering the will within the stipulated time after the death of the deviser, to avoid a conveyance by the heir-at-law. In that case the subject is discussed at considerable length; it does not, as I understand it, decide that infancy cannot under any circumstances constitute the "inevitable difficulty" or "impediment" mentioned in the Act; for in one part of the judgment the Court said: "Without deciding that infancy can under no circumstances form an impediment, it is sufficient to determine that it cannot be allowed as such

Judgment. upon the evidence given in this case." And in another part of the judgment the Court said: "If infancy may, under circumstances that are fully shewn, be held to present an inevitable difficulty, no such circumstances are shewn here."

The case *McLeod v. Truax* is referred to as being the law in *Mandeville v. Nicholl*, 16 U. C. R. 609, and it is also referred to in *Re Davis*, 27 Gr. 199, as pointing out differences between our Acts and the English Acts in this respect. In *Re Davis* the learned Judge says: "And our law allows the devisee the benefit of the excuse so long as the difficulty lasts, which is otherwise under the British Acts." And further on the learned Judge said: "Had the will in this case been concealed, or suppressed, or destroyed immediately upon the testator's death, it is quite possible that the devisees would be unaffected by the failure to register." Other cases were referred to on the argument (bearing upon the subject), but I do not know that they shew or indicate any more than appears in the ones I have referred to.

The circumstances in regard to the will in the present case and those surrounding the plaintiffs, who were infants, I have before mentioned and referred to at some length. I need not repeat them.

The words used by the legislature are "inevitable difficulty" and "impediment." By these, I think, must be meant something less than an absolute impossibility; and if so, it appears to me that it would be difficult to conceive a case in which the circumstances and facts would present an inevitable difficulty, if they did not do so in the present case.

The language used in *McLeod v. Truax* authorizes one, I think, to look at the infancy and the other facts and circumstances taken in conjunction, in the effort to determine whether or not the impediment existed, and so looking at the present case, I am of the opinion that there was an "inevitable difficulty" or "impediment" such as was intended by the Act; and that the difficulty or im-

pediment has not yet been removed. I think no wilful neglect or default of the plaintiffs has been shewn, and, as has been said, our law allows the devisee the benefit of the excuse so long as the difficulty lasts. Judgment.
FERGUSON, J.

It was said that the plaintiffs might have registered the pages of the will that had not been destroyed. It was answered that even if this could have been done, they did not contain any devise to the plaintiffs. It was suggested that a probate might have been registered, but there is yet no probate. In my opinion the plaintiffs have not lost the devises to them by reason of the registration of instruments affecting the lands under which priority over the plaintiffs' claims is sought to be established; and if I am right in this, it disposes in the plaintiffs' favour of the question of priority contended for by reason of the registration of the assignment from Albert O'Neill to the defendant Owen, and also the priority claimed by reason of the registration of the mortgage deed between the same parties, dated the 12th November, 1887, and apparently taken by the defendant Owen as a collateral security from Albert O'Neill. The mortgages, however, in favour of the Huron and Erie Savings and Loan Company in the pleadings mentioned are, as before stated, nevertheless, to stand and be considered good as against the plaintiffs.

The devise to the plaintiffs was not to come into possession till they should attain full age, not being less than twelve years from the date of the death of the testator, who died on or about the 9th of May, 1877. They are, therefore, not entitled to the possession of the land till the 9th of May, 1889.

The plaintiffs ask to have the will of the late Harvey O'Neill dated the 17th day of April, 1877, established by the judgment of the Court, and to this I think they are entitled. The contents of this will have been and are now easily shewn with certainty. They ask for an order for the delivery of possession of the lands to them. To this I think they are not yet entitled, because the twelve years have not expired.

Judgment. They ask for an order upon the defendant Albert O'Neill
FERGUSON, J. to pay off the two mortgages to the Huron and Erie Savings and Loan Company, and a declaration that they are entitled to rank upon his estate for the amount unpaid upon these mortgages, and to this I think they are entitled.

I do not yet see my way to making the declaration they ask as to the conveyances to Albert O'Neill from his brothers and sisters, for in theory some interest may have passed by them.

The matter of the counter-claim was not as fully discussed as perhaps it would have been if the conclusions have arrived at had been known at the time, and, if need be, I will hear what may further be said as to this before the judgment is finally settled.

The collusion alleged by the defence has not been proved, but the defence did not rest wholly upon this, and comparatively little was said about it at the trial. Such allegations were, for the most part at all events, confined to the matters of the counter-claim.

As to the costs. The action is primarily to establish the will, though in the event of it being established, many other kinds of relief are asked. The general rule is found in Morgan on Costs, 345: "Where the heir is defendant he will be entitled to his costs from the plaintiff, both at law and in equity, though an issue *devisavit vel non* is granted at his request and found against him, if he has not been vexatious or guilty of tampering with the will."

The case of *Macaulay v. Kemp*, 27 Gr. 442, was a case of impeaching a will, and shews on what ground an unsuccessful party may be relieved from payment of costs, and indicates that if there be sufficient and reasonable ground, looking at the knowledge and means of knowledge of the opposing party, to question," &c.

In the present case the testator left his estate under testamentary papers of the character and in the condition that have been before described. If there was nothing more the costs of establishing the will and declaring the rights of the parties interested would reasonably be paid out of

the estate. It seems to me, however, that the defendant ^{Judgment.} Albert O'Neill, the father of the plaintiffs, has by his ^{FERGUSON, J.} conduct in regard to the estate—with the knowledge of the facts that I have before alluded to—deprived himself of all right to claim costs out of the estate, or from any one.

The defendant Owen, in respect of at least part of his contention, represents creditors under an assignment made to him under the Act.

In respect of another part of his contention, he claims as mortgagee upon the lands, and against the will. He has, as I have already said, charged collusion and fraud, which he has not proved. His position as to costs of the litigation, taken all in all, is peculiar. At present I think there appears enough in his favour to relieve him from payment of costs, and I am inclined to think he should have his costs out of the estate.

My present opinion then is that the plaintiffs and the defendant Owen should have their costs out of the estate of the late Harvey O'Neill, but that the defendant Albert O'Neill should have no costs.

If counsel speak to the other matter left open, they may at the same time (on settling the judgment) be heard on the question of costs, which may so be considered open for that purpose.

January 7, 1889. Counsel for both parties appeared before FERGUSON, J., and argued the questions that were left open for argument by the foregoing judgment, namely, the matter of the counter-claim and the matter of costs.

January 30, 1889. FERGUSON, J. :—

As to the counter-claim. What is claimed by the defendant Owen is that there should be a reference to the Master to fix the value of the crop of fall wheat that was in the ground at the time the plaintiffs took possession of the land, and one year's occupation rent, there being but the one season for the use of the farm after such taking of

Judgment. possession by the plaintiffs, and before the expiration of
FERGUSON, J. the twelve years mentioned in the will when the plaintiffs
would be entitled to the possession.

A copy of the will is now left with me, and I find that it contains a provision respecting the land during these twelve years. After giving certain legacies, which it is said are still unpaid, the will proceeds: "My request is that the land be rented for grazing purposes only for the term of twelve years, and that the rent arising therefrom be also dealt with in the same manner as other moneys hereinbefore named." If this can be read that the land be rented by my executors, &c., there is an express power to the executors to rent the land for the twelve years for grazing purposes. If it cannot be so read, there is yet the implied power to the executors to lease the land for or for any remainder of these twelve years, because their hand was the hand to receive, deal with, and distribute and pay over the rents to arise, so that the executors could at any time during these twelve years have leased the land for the purposes mentioned in the will, and had they done so they would have been accountable to the parties entitled thereto in respect of the rents arising; and further, if the executors had proved the will, they might have been held accountable for neglect and default in failing to lease the land as directed, or rather requested, by the testator, and applying the rents according to the will.

The executors, as I have said, might at any moment have leased the land to a tenant. Such tenant would have had a good title, assuming that the testator had such a title, and this is not disputed. The tenant, had there been one, could have evicted Albert O'Neill or Owen, had he found either in possession of the land. He could have evicted Albert O'Neill even after the fall crop spoken of had been sown without permitting him to reap it, for the rule that gives the tenant the right to reap what has been sown by him is, as I understand, confined to tenancies at will, and Albert O'Neill was not a tenant at will.

The will, as it appears to me, shews that the testator

intended by it to dispose of the land altogether, out and Judgment.
out; which, in a way, the will actually does. Yet it FERGUSON, J.
leaves these twelve years' use of the lands under a power
to be exercised by the executors; and, by accident or
chance rather than otherwise, it was not exercised. It is
to me not a little difficult to perceive when such a will has
been made, that the heir-at-law can take any substantial
interest in the land. Owen claims under the heirs-at-law
as one of the foundations of his counter-claim; and, even
assuming that any interest did pass to the heirs-at-law, the
claim derived under or from such an interest was, as it
appears to me, as a matter of law, of an extremely uncer-
tain and precarious character, and I think not such as to
justify me in directing the reference that is asked. It is
to be borne in mind in this connection that Owen was never
in possession, and that possession was not gotten away
from his assignor, Albert O'Neill, by force or fraud, as in
Doe Hughes v. Dyeball, Mood. & M. 346, and cases of that
class, so as to give the right to re-take possession, or
rather regain it, without proving title.

The other ground on which it was sought to maintain
this counter-claim was the fact that Albert O'Neill was in
actual possession at the time of the assignment by him to
Owen; that the bare possession was an assignable inter-
est; that by the assignment Owen obtained the right to
the possession; that the possession was taken by the
plaintiffs to his exclusion therefrom; and that he is, there-
fore, entitled to the value of the fall crop that was in the
land, and the whole year's use of the farm as damages for
the act done by the plaintiffs in taking the possession; and
the well-known case of *Asher v. Whitlock*, L. R. 1 Q. B. 1,
was relied on; but I do not see that that case goes the length
that is required to support the contention. There the dis-
pute was as to the right of possession and nothing more.
The part of the head-note that states the part of the
decision relied on here is in these words: "A person in
possession of land without other title, has a devisable
interest, and the heir of his devisee can maintain eject-

Judgment. ment against a person who has entered upon the land and
FERGUSON, J. cannot shew title or possession in any one prior to the testator."

The Chief Justice in his judgment does say : " There can be no doubt that a man has a right to devise that estate, that the law gives him against all the world but the true owner." Mr. Justice Mellor in his judgment says : " The fact of possession is *prima facie* evidence of seisin in fee. The law gives credit to possession unless explained and Mr. Merewether, in order to succeed, ought to have gone on and shewn the testator's title to be bad, as that he was only tenant at will, but this he did not do." The learned Judge then refers to *Doe Hughes v. Dyeball*, before alluded to. In that case the possession was wholly unexplained.

In this case, if my judgment in the other branch, or rather upon the plaintiffs' case, is to be taken as correct, the nature of the possession is fully seen and understood, its character, as I have said, being extremely uncertain and precarious. In that case what was in dispute was, as I have already said, the right to the possession alone. Here what is in contention is the alleged damages before mentioned, being the value of a crop, and for the injury alleged to have been sustained by the alleged deprivation of possession for a whole year or more. The two cases are materially different. The one does not support the contention in the other, and I am of the opinion that the defendant Owen does not on this ground of contention shew enough to justify me in ordering the reference he asks. I am of the opinion that the counter-claim should be and it is dismissed with costs.

As to the costs of action. I have perused, with some care, the authorities referred to by counsel, and my opinion remains unchanged. The defendant Owen had no connection with the transaction that took place after the death of the testator, and before the making of the assignment and the mortgage to him. He had an apparent interest in the estate that had been the property of the testator ; and the testator had left his will and the property referred

to in it in a condition to be the subject of difficulty and Judgment. litigation; and I think the authorities shew that, so far as FERGUSON, J. costs are concerned, Owen was justified in contesting the matter in a reasonable way. He is, I think, entitled to his costs of the action out of the estate of the testator. It is not disputed that the plaintiffs are entitled to their costs out of the same estate.

If, however, upon a taxation of costs it appears that the defendant Owen has made any charges of fraud not appertaining to the counter-claim, he will not only not get but will have to pay the costs occasioned by these; and in such case the plaintiffs' costs out of the estate will of course be just so much less.

[CHANCERY DIVISION.]

BANK OF MONTREAL V. BOWER ET AL.

Will—Devise—"Wish and desire"—Precatory trust—Estate in fee.

A testator, by his will, made an absolute gift of all his property to his wife, subject to the payment of debts, legacies, funeral and testamentary expenses, and by a subsequent clause provided as follows: "And it is my wish and desire after my decease that my said wife shall make a will dividing the real and personal estate and effects hereby devised and bequeathed to her among my said children in such manner as she shall deem just and equitable."

Held, that this did not create a precatory trust and that the wife took the property absolutely.

In re Adams and The Kensington Vestry, 27 Ch. D. 394, and *In re Diggles, Gregory v. Edmondson*, 39 Ch. D. at p. 257, specially referred to and followed.

The change in the current of decision on the subject of precatory trusts remarked upon.

Statement.

THIS was a mortgage action in which the defendants contended that the mortgagor had a life estate only, in the lands mortgaged, and consequently could not make a mortgage in fee.

The mortgagor's title was derived under the will of her deceased husband Joseph Bower, which will gave her the property absolutely, subject to the payment of debts, some trifling legacies, and funeral and testamentary expenses; but also contained the following clause:

"And it is my wish and desire, after my decease, that my said wife shall make a will dividing the real and personal estate and effects, hereby devised and bequeathed to her, among my said children in such manner as she shall deem just and equitable."

The action was tried at Ottawa, on April 30th, 1889, before FERGUSON, J.

McCarthy, Q.C., and *R. G. Code*, for the plaintiffs. The early part of the will clearly gives the fee to the mortgagor subject only to the payment of debts, legacies, funeral and testamentary expenses. The subsequent clause does not cut down the estate, or create a trust. The property devised

in the will is *all* the property, and nothing is defined or described in the subsequent clause. The widow takes absolutely, and is complete owner: *In re Hutchinson and Tenant*, 8 Ch. D. 540; *Breton v. Mockett*, 9 Ch. D. 95; *Nelles v. Elliot*, 25 Gr. 329; *Stead v. Meller*, 5 Ch. D. 225. There is no definite gift over, and no precatory trust: *Parnall v. Parnall*, 9 Ch. D., at p. 97, *per* Malins, V.C. If the widow took any interest at all the remainder was uncertain. This case is similar to *Mussoorie Bank v. Raynor*, 7 App. Cas., at p. 331, where the property was given over only when no longer required by the first taker. The testator intended the widow to deal with the property as she pleased: *Lambe v. Eames*, at pp. 600, 602. The Court must look at the whole will, not merely at particular words: *In re Diggles, Gregory v. Edmondson*, 39 Ch. D. 253, *In re Adams and The Kensington Vestry*, 27 Ch. D., at p. 408, *per* Baggallay, L.J., and p. 410, *per* Cotton, L.J.

Kidd, for the defendants, The use of the words "wish and desire," creates a trust: Lewin on Trusts, 8th ed., p. 131. The children are entitled under the will: *Liddard v. Liddard*, 28 Beav. 266; *Findlay v. Fellows*, 14 Gr. 66. The widow only takes a life estate: *Le Marchant v. Le Marchant*, L. R. 18 Eq. 414. When such words are used as "in full confidence," "confiding in his honor," &c., the devisee only takes a life estate: *Wace v. Mallard*, 21 L. J. Ch. 355; *Curnick v. Tucker*, L. R. 17 Eq. 320; *Wood v. Cox*, 1 Keen 317.

McCarthy, Q. C., in reply. The later cases differ from the earlier ones, and the Courts now lean against precatory trusts.

May 14th, 1889. FERGUSON, J.:—

The action is upon a mortgage made by the defendant Mary Ann Bower, the widow of the late Joseph Bower, to secure the payment of certain promissory notes which she had endorsed for the accommodation of Bower, Porter and Bower, being two sons and a son-in-law of her and the testator Joseph Bower.

Judgment. The making of the mortgage is admitted. It is over due, **FERGUSON, J.** and it is alleged that there is unpaid upon it a balance of \$8,188.69.

The plaintiffs ask payment of the amount remaining unpaid on the mortgage, or a sale of the lands, an order for possession of the lands, &c., the relief that is usually asked in mortgage cases.

The contention in the case arises as to the title that the mortgagor had when she executed the mortgage, and this depends upon the true construction and meaning of the will of the late Joseph Bower.

The defendant Harvey Bower was made a party to represent a class, the children of the testator, and the contention of the defence is that by this will, the mortgagor took at most only a life estate in the lands mortgaged, and there is a trust in favour of the children of the testator in respect of the fee in the lands.

The plaintiffs contend that the mortgagor took by the will an estate in fee in the lands, and that this she mortgaged to them.

The will is a very short one. It commences by devising and bequeathing all the messuages lands, tenements and hereditaments, and all other household furniture, ready money, securities for money, money secured by life insurance, goods and chattels, and all other the real and personal estate and effects whatsoever and wheresoever of the testator to the testator's wife (the mortgagor) her heirs, executors, administrators and assigns, to and for her and their own absolute use and benefit according to the nature and quality thereof respectively, subject only to the payment of the testator's debts, funeral and testamentary expenses, the charges of proving and registering the will, and the payment of the legacies given. Then follow gifts of legacies of ten shillings each, to each of the testator's ten children. After which, and apparently in a separate clause or paragraph, are these words:

"And it is my *wish* and *desire*, after my decease, that my said wife shall make a will dividing the real and personal

estate and effects hereby devised and bequeathed to her Judgment. among my said children in such manner as she shall deem ^{FERGUSON, J.} just and equitable." This is the last clause, excepting formal parts.

The will bears date the 3rd day of May, 1864, and by the probate thereof the testator seems to have died on or about the 7th day of September, 1870.

The land mortgaged to the plaintiffs was part of the real estate of the testator. The mortgage bears date the 7th day of July, 1885.

In this will there is, in the first place, an absolute gift of this, amongst other properties, to the mortgagor, the widow of the testator. No stronger or more effective words could, I think, have been used by the testator for this purpose than are employed in the will, in making this gift. Then, as said by James, L.J., in the case *Lambe v. Eames*, L. R. 6 Ch., at p. 599, one has to be satisfied that this gift is afterwards cut down. There is no doubt that the words "wish and desire" have been held to be precatory words upon which an implied trust may arise: *Lewin on Trusts*, 7th ed., 118, 119, and the cases there referred to; but it is not in every case in which these or the like words are employed by a testator that such a trust does arise, and, besides the law on this subject seems lately to have undergone some changes. It is said that the current of decisions with regard to precatory trusts is now changed, and the Court will not allow a precatory trust to be raised where the testator shows an intention to leave property absolutely. Brett's L.C. in Eq. p. 13, under *In re Adams and The Kensington Vestry*, 27 Ch. D. 394, where the author says that the decision of the Court of Appeal in that case may be considered as finally settling the conflict between the older and the modern authorities on the subject of "Precatory Trusts." There the testator gave "all his real and personal estate and effects wheresoever and whatsoever unto and to the absolute use of his wife, her heirs, executors, administrators and assigns, in full confidence that she would do what was right as to the disposal thereof between

Judgment. his children, either in her lifetime, or by will after her
FERGUSON, J. decease," and it was decided that the widow took an absolute interest in the property, "unfettered by any trust in favour of the children."

In the same case Cotton, L.J., says, at p. 410: "I have no hesitation in saying myself, that I think some of the older authorities went a great deal too far in holding that some particular words appearing in a will were sufficient to create a trust. Undoubtedly confidence, if the rest of the context shews that a trust is intended, may make a trust, but what we have to look at is the whole of the will which we have to construe, and if the confidence is that she will do what is right as regards the disposal of the property, I cannot say that that is, on the true construction of the will, a trust imposed upon her. Having regard to the later decisions, we must not extend the old cases in any way, or rely upon the mere use of any particular words, but, considering all the words which are used, we have to see what is their true effect, and what was the intention of the testator as expressed in his will."

And Mr. Justice Lindley, at p. 411, after quoting from the judgment in the case *Mussoorie Bank v. Raynor*, 7 App. Cas. 321, 330 (P. C.), says: "I am very glad to see that the current is changed, and that beneficiaries are not to be made trustees unless intended to be so by the testator."

Notwithstanding the ingenious and forcible contention to the contrary, I cannot but think there is much similarity between the effects of the words used in the will in the above case in 27 Ch. D., and the effect of those employed in the will in the present case.

A very large number of cases were referred to by counsel. They cited, I think, all the recent cases, and many of the older ones.

In considering questions arising upon the construction of wills, one searches almost in vain to find the identical words of the will in question in a decided case. I have at some trouble examined the cases relied on by counsel, and am of the opinion that there is not the trust con-

tended for by the defence, and that the true view is Judgment. such as stated by Bowen, L. J., in the case *In re Diggles*, FERGUSON, J. *Gregory v. Edmondson*, 39 Ch. at p. 257, namely, that no obligation at all was imposed upon the widow, but only a request made to her; that there was no trust, and that she took the estate absolutely. I am unable to read the recent cases on the subject and understand that they permit me to arrive at any other conclusion.

The plaintiffs are, I think, entitled to the relief they ask, an order for payment of the money. In default a sale of the lands, with the reference to the Master at Ottawa, an order for possession, &c., &c., with costs.

Judgment accordingly.

G. A. B.

[CHANCERY DIVISION.]

DARBY V. THE CORPORATION OF THE CITY OF TORONTO
ET AL.

Municipal corporations—52 Vic. ch. 73, sec. 14, (O.)—Representation previous to submission of money by-law—Costs.

Under 52 Vic. ch. 73, sec. 14, (O.), the Corporation of the City of Toronto, "may by by-law entrust the management and control of the erection and completion of the proposed new combined court-house and city hall, * * * to a commission consisting of three members who shall be appointed by by-law."

The council previous to the submission to the vote of the electors of a by-law for the raising of money to erect such court-house, published a pamphlet which contained under the heading, "Some of the reasons why the buildings should be erected," this clause "In order that the buildings may be erected in accordance with the plans and specifications, * * * legislation has been obtained, authorizing the appointment of three commissioners, to whom will be entrusted the supervision of the work." After the by-law was approved of and passed, the council decided not to appoint commissioners.

In an action by a ratepayer to enjoin the corporation from proceeding with the work, pending the appointment of such commissioners, or for a mandamus ordering the council to make such appointment. It was

Held, that as there was no person or class of persons for whose benefit the power under 52 Vic. ch. 73, sec. 14, (O.), was conferred, or upon whom a right was conferred to have it exercised, such power was not obligatory but only permissive.

Held, also, that as the representation contained in the pamphlet formed no part of the by-law, and was not a representation of an existing fact, but a mere statement of intention and formed no part of a binding bargain between the corporation and the ratepayers, there was nothing to bind the former to adhere to it, and they were at liberty to revoke or disclaim that intention and take another course, and that the action should be dismissed; but as the conduct of the corporation was so discreditable in the matter, their costs were refused.

Remarks upon the practice of taking a *plebiscite* upon a subject wholly within the discretion of a corporation.

Statement. THIS was a motion for an injunction made by George Darby, in an action on behalf of himself and all other rate-payers of the city of Toronto against the corporation of the said city, John McMillan* and John Patterson,* to restrain the defendants from entering into any contract for the erection of a court-house and city hall in the said city until three commissioners had been appointed to supervise the work, or for a mandamus compelling the City Council to appoint such Commissioners.

*The defendant McMillan was President of the council, and the acting mayor, and the defendant Patterson was the acting treasurer of the city during the temporary absence in England of the Mayor and Treasurer on municipal business.—RXP.

Under 52 Vic. ch. 73, sec. 14 (O.), the corporation "may by ^{Statement.} by-law entrust the management and control of the erection and completion of the proposed new combined court-house and city hall * * to a commission consisting of three members who shall be appointed by by-law," &c.

It appeared from the affidavits filed that although previous by-laws for raising money for the building of the court-house and city hall had been passed, a further sum of \$600,000 was required, and that a by-law to authorize the issue of debentures for that purpose was submitted for approval to the vote of the ratepayers on May 18th, 1889: that previous to such submission, a pamphlet giving information and particulars of the court-house and city hall scheme had been printed and circulated among the ratepayers by the Court House Committee,* which pamphlet was signed by the Mayor, and the Chairman of the Court House Committee who were authorized so to do by resolution of the council: that under the heading "Some of the reasons why the buildings should be erected" was this clause: "In order that the buildings may be erected in accordance with the plans and specifications already adopted, legislation has been obtained authorizing the appointment of three commissioners, to whom will be entrusted the supervision of the work, thereby securing the carrying out thereof strictly in accordance with the plans and specifications, and without extras:" that the by-law was submitted and approved of by a majority of the ratepayers who voted, but after it was so approved of, and after it was passed by the corporation of the said city, the Court House Committee reported against the appointment of a commission and instructed the city solicitor to prepare the contracts for the several works in connection with the said buildings, and the council adopted that report.

The motion came on for argument on July 2nd, 1889, before OSLER, J.A. †

*A committee of the council appointed to deal with the building of the court-house and city hall.—R.R.P.

† Sitting at the request of and for BOYD, C., as vacation Judge.—R.R.P.

Argument.

W. M. Hall, for the plaintiff. The plaintiff has the right to bring this action without making the Attorney-General a party: *Wilkie v. The Corporation of the Village of Clinton*, 18 Gr. 557; *Walluce v. The Corporation of the Town of Orangeville*, 5 O. R. 37; *Blaikie v. Staples*, 13 Gr. 67; *Morrow v. Connor*, 11 P. R. 423. The defendants should be restrained: *Helm v. The Corporation of the Town of Port Hope*, 22 Gr. 273. The pamphlet represented that the money to be raised would only be expended in one way, viz., by a commission. The wording of that representation was definite: "To whom will be entrusted the supervision of the work, &c." The plaintiff and other rate-payers, whose votes approved of the by-law, were misled by that representation. The permission given by the statute 52 Vic. ch. 73, sec. 14 (O.), creates a duty, and the corporation must appoint a commission. The moneys to be raised under the by-law are trust funds; *Smith v. The Corporation of the Township of Raleigh*, 3 O. R. at p. 411; citing Dillon on Corporations, 2nd sec. 437, and *The Mayor, &c., of Gloucester v. Osborn*, 1 H. L. C. at p. 285; Kerr on Injunctions, 3rd ed., 569; *Attorney-General v. The Mayor, &c., of Wigan*, 5 D. M. & G., at p. 54; *The Queen v. The Mayor, &c., of Exeter*, 6 Q. B. D. 135; Maxwell on the Interpretation of Statutes, 2nd ed., 287; *Macdougall v. Paterson*, 11 C. B. 755.

C. R. W. Biggar, contra. The legislation by the statute 52 Vic. ch. 73, sec. 14 (O.), was merely permissive and not mandatory. The representation in the pamphlet, if anything, was a mere intimation of intention, and is not definite enough even for that. No such intimation could possibly be binding, and the corporation or committee in the exercise of a careful discretion might find it advisable in the interests of the whole city to change it, even if made. The trust, if any exists, is only to apply the money in the erection of a Court House and City Hall, not to appoint a commission. *The Queen v. The Bishop of Oxford*, 4 Q. B. D. at pp. 553, 594-5; *Northwood v. The Corporation of the Township of Raleigh*, 3 O. R. 347; *Chrysler v. The Township of Sarnia*, 15 O. R. 180; *West Nissouri v. North Dorchester*, 14 O. R. 294;

Re Neuth & Brecon R. W. Co., L. R. 9 Ch. 263 ; *The York & Midland R. W. Co. v. The Queen*, 1 E. & B. 858.

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OSLER
J. A.

Hall, in reply.

July 9, 1889. OSLER, J. A. :—

The motion for the injunction is based on two grounds, (1) that upon the true construction of section 14 of the Act of last session it is compulsory upon the council to appoint a commission, and that the language of the section though in form wholly permissive—the council *may* appoint—is, under the circumstances, to be read in a mandatory sense—the council *shall* or *must* appoint. (2) That by reason of certain representations made to the electors by or on behalf of the council previous to the voting on the by-law, the council have precluded themselves from proceeding with the erection and construction of the Court House except through the medium of a commission, which, since the passage of the by-law they have declared their determination not to appoint.

I am clearly of opinion that there is nothing in the first ground of objection. There are, no doubt, cases in which the Court will construe as compulsory, language which is in itself merely directory or enabling, but the question in these cases always is, whether, though the statute in terms creates only a power, the circumstances are such as to create a duty. If that is not manifest, enabling words cannot have a compulsory force. The previous decisions on the subject were considered, and the law authoritatively declared in the case of *Julius v. Bishop of Oxford*, 5 App. Cas. 214, The Lord Chancellor (Earl Cairns) at p. 225 said that the cases appear to decide nothing more than this, “that where a power is deposited with a public officer for the purpose of being used for the benefit of persons who are specifically pointed out, and with regard to whom a definition is supplied by the Legislature of the conditions upon which they are entitled to call for its exercise, that power ought to be exercised, and the Court will require it to be exercised.” And Lord Penzance, at p. 232, spoke to the same effect : “The conclusion arrived

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ONLER
J. A.

at by the Courts in these cases was this, that regard being had to the subject matter, to the position and character of the person empowered, to the general objects of the statute, and, above all, to the position and rights of the person or class of persons, for whose benefit the power was conferred, the exercise of any discretion by the person empowered could not have been intended."

Now, in the present case the power which it is said the council is bound to exercise, is conferred by section 14, a section which stands alone. It enacts simply that the council "may by by-law submit the control and management of the erection and completion of the proposed new combined Court House and City Hall to a commission consisting of three members who shall be appointed by by-law, and shall receive such remuneration as the council may by the same or by any other by-law determine."

There is nothing in the rest of the Act, or in any previous legislation on the subject, to control the plain and ordinary meaning of these words, which are in themselves, so far as the appointment of a commission is concerned, wholly permissive and enabling. We are shut up to the terms of the section, and it is as plain as anything can be that one essential requisite for the construction contended for is wholly wanting, namely, the existence of any person or class of persons for whom or for whose benefit the power is conferred, or upon whom, under any circumstance, a right is conferred to have the power exercised. It is impossible to say that the general body of ratepayers have such a right unless we are prepared to affirm it of numberless other instances in which, under the Municipal Act, or under special Acts, the council is empowered to pass by-laws. In this, as in all such cases, the power is reposed in them as representing the whole corporation to be used or not as in their discretion they may think proper. It would hardly have occurred to any one to raise a doubt about it if the expenditure upon the buildings could have been confined within the original limits, although, if the Act imposes the duty of appointing a commission it exists

quite irrespective of the additional expenditure authorized by the present by-law. Judgment.

The other ground on which the Court is asked to interfere bears a more plausible appearance.

OSLER
J.A.

It is shewn that a few days before the voting took place the council caused to be distributed among the rate-payers at a very considerable expense, a pamphlet containing a picture, copies of the floor plans, and a full description of the proposed buildings, and a mass of detailed information as to the negotiations which had taken place between the county and the city on the subject of the court house, the position of the city as regarded its legal liability to erect it, and the pressing necessity there was for proceeding with it at once. The particulars of the debenture debt \$1,050,000, already authorized for construction, were given, and it was shewn that the further sum of \$600,000, now asked for, was necessary in order to carry out the scheme on the scale, and at the cost designed. The pamphlet, which purports to be signed on behalf of the council, by the Mayor and the Chairman of the Court House Committee concludes with a number of desultory disconnected paragraphs headed "Some of the reasons why the buildings should be erected," one of which reads thus:

"In order that the buildings may be erected in accordance with the plans and specifications already adopted, legislation has been obtained authorizing the appointment of three commissioners, to whom will be entrusted the supervision of the work, thereby securing the carrying out thereof strictly in accordance with the plans and specifications, and without extras."

The by-law was carried by a very large majority of votes, and has since been duly passed by the council. The plaintiff and two or three other deponents state that they would not have voted, and their belief that many other persons would not have voted as they did in favour of the by-law, had they not been induced by this paragraph to believe that a commission would be appointed as stated therein.

In the absence of the Mayor, the council, it appears, have by a majority resolved not to appoint one.

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OSLER
J.A.

On behalf of the plaintiffs, it was strongly urged that the counsel were bound to make good the representation contained, as it is said, in the above paragraph, and that the by-law must be deemed to have been voted for on the faith of such representation, so as to preclude the council from expending the money voted thereby, until a commission should be appointed. The by-law itself is not attacked, nor is the right of the defendants to raise the money as thereby authorized disputed.

The question then is, what this representation amounts to, and how far it can be considered the foundation of a right of action in the plaintiff or any one else against the corporation.

A by-law is not a contract between the ratepayers and the council. It is a piece of legislation which must sometimes, as in the present instance, be sanctioned by the vote of the former; and if that has been obtained by improper means the by-law may be set aside. Thus, if there was reason to believe that it had been carried by misrepresentation of existing facts put forth by the council or those interested in passing it, I apprehend that in a clear case of that kind the Court would have no difficulty in setting it aside.

Again, if the by-law on its face professed to be founded upon some course to be taken by the council in the future, as for instance, the appointment of a commission, that being declared by the by-law itself, the council would probably not be permitted to recede from that position, or to say that the power to pass and to act under the by-law, had been conferred by the vote of the ratepayers upon any other terms than those imposed by the by-law itself.

The case before me differs from both of the cases suggested. The representation forms no part of the by-law, and is not a representation of an existing fact, as, that the council had appointed a commission. At the furthest, it is no more than a statement that legislation had been obtained authorizing the council to appoint a commission (which was so far true), and that it was their *intention* to appoint one.

Now, apart from the difficulty that the council have not declared their intention by by-law, and that the appointment of a commission was not a term or condition expressed in the by-law to be voted on, it is, in my opinion, impossible to maintain that this representation forms part of a bargain in the sense of a *binding* bargain between the council and the ratepayers. There was no contract, no misrepresentation of any existing fact. Any one who thought about the matter for a moment would see that it was a mere representation of intention ; and that, as such, there was nothing to bind the council to adhere to it. They were at liberty to revoke or disclaim that intention and take a different course if they should think proper. It appears to me that they are within their legal rights in doing so, and that the motion for the injunction must, therefore, be refused.

The plaintiff may, if he wishes turn the motion into a motion for judgment to avoid further expense.

An affidavit has been filed on behalf of the council, in which it is stated that they have submitted to the vote of the electors the question whether they are in favour of the appointment of a paid commission of three persons at a cost of \$8,000 per annum for a probable term of five years.

I cannot see what this has to do with the case. It is another instance of a pernicious practice which has been too frequently resorted to, of taking a *plebiscite* upon a subject wholly within the discretion of the council, which it is their duty to decide and to take the responsibility of deciding, themselves, without putting the public to expense. In this case, it is true, no additional expense will be incurred as there is also a by-law to be voted on, but the practice is none the less objectionable as an attempt to evade responsibility and to place it where it does not belong.

As regards the costs of the application. In deciding whether or not an injunction should issue I have nothing to do with the propriety of the course adopted by the

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OSLER
J.A.

Judgment. council in repudiating a representation apparently put forward by their authority, and calculated to mislead persons who thought a commission desirable, into believing that the council would appoint one. In disposing of the costs however, I am at liberty to say that the conduct of the council appears to me to have been so discreditable that their costs ought to be refused.

OSLER
J.A.

G.A.B.

[CHANCERY DIVISION.]

BARBER ET AL. V. MCKAY ET AL.

Action for recovery of land—Probate—Evidence of will—Pleading—Common source of title—Indirect admission in pleading—R.S.O. 1887, ch. 61, secs. 38, 44.

In an action for the recovery of land, the plaintiffs claimed title under a deed from the executors of one S., but the only evidence of that will produced by them was the copy of the probate from the Registry office, with the affidavit of verification attached.

Held, that this was not proper evidence of the will, no notice having been given under R.S.O. 1887, ch. 61, sec. 38.

The plaintiffs, however, sought to support their case by reference to a certain statement in the defendants pleading, in which, besides denying their right to recover, she herself also claimed title under a deed from the executors of S.

Held, that they could not take that part of the pleading which suited their purpose and reject the rest: they could not use a scrap of it to eke out the insufficiency of their own evidence.

Statement. THIS was an action for the recovery of land brought by Frederick W. Barber and Walter M. Barber against Mary Ann McKay and John McKay. The plaintiffs, in their statement of claim set up that they were executors under the will of Joseph Barber, dated May 16th, 1887, who died January 7th, 1888, seized in fee of the lands in question; but that the defendants entered into possession in 1880, and refused to give up possession of the lands to the plaintiffs.

The defendant, John McKay, disclaimed any interest in the lands. The other defendant, in her statement of defence,

while denying the allegations in the statement of claim, admitted that the plaintiffs were the executors under the will of Joseph Barber, but denied that he had died seized in fee of the land, and alleged that before her marriage with her co-defendant, she was the wife of one Robert Harwood, who purchased the lands in question from James Barber, the executor of the will of Margaret Smeltzer, deceased, on September 19th, 1873, and that James Barber duly conveyed the lands to him, but he neglected to register the deed: that she and Harwood then entered into possession and remained in possession until the death of the latter on November 20th, 1875, intestate, leaving herself and several children him surviving, and she had continued in possession till the present time, and claimed that the plaintiffs' claim was barred by the provisions of the Real Property Limitation Act. Statement.

The action came on for trial on March 11th, 1889, before ROSE, J., at Milton.

As evidence of the will of Margaret Smeltzer, the plaintiffs produced from the Registry Office the copy of the probate deposited there with the affidavit of verification: (see R. S. O. 1887, ch. 111, sec. 73,) but did not prove that they had given any notice under R. S. O. 1887, ch. 61, sec. 38.

On May 11th, 1889, the learned trial Judge gave judgment as follows:

ROSE, J.—The plaintiffs produced an abstract of title from the registry office apparently shewing title in them, but failed to prove all the deeds referred to in the abstract. On the abstract the defendants do not appear as registered owners.

The plaintiffs failing, owing to technical difficulties, to prove a paper title from the Crown, proved possession in one Margaret Smeltzer, through whom they claimed, and proved title by deed from her.

This possession was prior to the defendant's possession.

The defendant, John McKay, by the statement of

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Rose, J.

defence disclaimed, and the defendant Mary Ann McKay claimed title by deed from the said Margaret Smeltzer, admitting that such deed had not been registered. She also claimed title by possession, but the evidence offered shewed that this was unfounded.

The deed from Margaret Smeltzer to the grantors of the plaintiffs' testator, was duly registered.

It is clear that the plaintiffs are entitled to recover unless the unsuccessful attempt to prove a paper title prevents them shewing title from a person in possession prior to the defendants, and on these facts I do not think it does.

The defendants did not produce any conveyance from Margaret Smeltzer, as alleged in the pleadings, and in fact offered no evidence. So far as appears they were in without any right or title or claim in law or in equity.

Davison v. Gent, 1 H. & N. 743, cited by Mr. Shilton, is, I think, authority in his favour.

There must be judgment for the plaintiffs against both defendants, with costs against Mary Ann McKay.

The defendant, Mary Ann McKay, now moved by way of appeal from this judgment, and the motion came on for argument on June 13th, 1889, before BOYD, C., and FERGUSON and ROBERTSON, JJ.

Laidlaw. Q. C., for the defendant. The evidence given at the trial did not establish any title to justify judgment in the plaintiffs' favour. No proper proof was given of a title in Margaret Smeltzer, nor of title through her.

Shilton, for the plaintiffs. I refer to *Thorne v. Williams*, 13 O. R. 577, to shew that all that is necessary is for the plaintiff to prove a title superior to the defendant. [FERGUSON, J.—In *Thorne v. Williams*, the plaintiff recovered on an equitable title.] The defendant here claimed from a common source of title with the plaintiffs, and is estopped from denying the plaintiffs' title: *Sedgwick & Waite on Trial of Title to Land*, 2nd ed., sec. 803. [FERGUSON, J.—But the question is whether our rule as to the effect of pleading possession does not put the matter in a different position.] *Doe dem. Oliver v. Powell*, 1 A. & E. 531, recognises the principle that the defendant by claiming to have

purchased this property from the same source of title as the plaintiffs', is precluded from disputing that title : *Asher v. Whitlock*, L. R. 1 Q. B. 1, shews that possession is some evidence of title. Argument.

Laidlaw, in reply. I refer to *Danford v. McAnulty*, 8 App. Cas. 456, on the application of the rule as to pleading possession. I took the objection at the trial that probate of the will was no proof of the will in an action of ejectment. [FERGUSON, J.—But cannot the plaintiff say I relied on your form of pleading whereby you plead a common source of title?] But we in our pleadings deny the allegations in the statement of claim. [BOYD, C.—But they meet this by proving prior possession in Mrs. Smeltzer. You admit Mrs. Smeltzer made a will of which James Barber was executor, and that he sold to you. It will not be implied that he sold wrongfully.] I submit an absolute denial of the plaintiffs' allegations puts the plaintiffs to proof of title. They cannot read my pleading against me unless they admit it altogether. If they take it as an admission, they must take it as an admission throughout, and the whole admission must be taken altogether. *Shaver v. Jamieson*, 25 U. C. R. 156, is directly in point.

June 13th, 1889. BOYD, C.:—

If the will of Mrs. Smeltzer had been proved, I think that the judgment might have been affirmed; but the copy of the probate produced from the registry office was, as against the objection of the defendants, not proper evidence. No notice was given of the intention to use the probate under sec. 38, and it does not appear to me that sec. 44 of the Evidence Act applies (R. S. O. ch. 61) to make evidence of the registered copy of the probate. That section applies to original instruments. What is here put in is nothing but a copy of the probate registered upon an affidavit that it is a copy, and it is not even the original of the probate: even if the original it could not be used as of right unless after the notice allowed by sec. 38. This objection was overlooked by the trial Judge.

Judgement.

BOYD, C.

Nor can the plaintiffs invoke the pleading of the defendant in which she sets up the manner in which her occupancy arises, viz., by reason of a deed alleged to be made by the executor under the will of Mrs. Smeltzer? The plaintiffs cannot take that part of this pleading which suits their purpose and reject the rest: they cannot use a scrap of it to eke out the insufficiency of their own evidence as to the contents of Mrs. Smeltzer's will. Plaintiffs must prove their right to recover as against the denial of the defendant that they ought not to recover, and unless a fact is fairly admitted by the terms of the defence, they cannot rely upon that as exempting them from proving it in the proper way.

I think there should be a new trial, and I would favour costs being reserved, but my brothers say that as the plaintiffs' proof fails, judgment should be against them with costs, unless they are willing to pay the costs of the last trial and this motion, in which event there should be a new trial for their benefit.

FERGUSON, and ROBERTSON, JJ., concurred.

A. H. F. L.

[CHANCERY DIVISION.]

REGINA V. ROMP.

Criminal law—Confession—Admission—Improper inducement—Evidence.

Where it appeared that a police constable gave the usual caution to the prisoner, who was arrested on a charge of obstructing a railway train by placing blocks upon the line, but afterwards said to him: "The truth will go better than a lie. If anyone prompted you to it you had better tell about it," whereupon the prisoner said that he did the act charged against him.

Held, that the admission was not receivable in evidence, and a conviction grounded thereon was improper.

Regina v. Fennell, 7 Q. B. D. 147, followed.

THIS was a case reserved from the County Judge's Statement Criminal Court of the county of Huron, before whom Henry P. Romp was tried on December 5th, 1888, upon a charge of placing obstructions upon the track of the Grand Trunk Railway, on Saturday, November 10th, 1888.

It appeared from the case that the prisoner was convicted upon verbal and written admissions made by him, which his counsel objected could not under the circumstances be received.

The written admission was in the following form :

SATURDAY NIGHT, 10 1888.

I, Henry P. Romp. I put blocks on track. I don't want anybody else blamed.

HENRY P. ROMP.

The evidence as to the verbal admissions was as follows : John Yule, the county constable, after deposing that he went to the place where the blocks had been placed upon the railway track, and then upon a subsequent day, viz., on Monday, November 12th, 1888, saw the prisoner, continued, so far as it is material to set out his evidence, as follows :

"I said to prisoner : Did you do this thing, or did some one prompt you? I cautioned prisoner when I first spoke to him, that anything he might say would be given in evidence against him. He said he did not do it. * * I left prisoner with Spence," (a detective in the employment of the Grand Trunk Railway Company.) "Came back. Prisoner said : I did it. No one prompted me. Spence said : Write down what you

Statement. like. He wrote the paper produced, and handed it to me. * * Have known prisoner some years. * * He is eccentric. I told him he was crazy. I thought he was foolish. He seemed to think when he signed the paper that the matter was settled. He wanted to go to his work again. * * No one was present when I first spoke to him. I had no suspicion of prisoner then. Saw him on Tuesday in the round house. * * On the Tuesday I found the prisoner with detective Spence. * * I told the prisoner anything you say will be given in evidence against you. After this, prisoner said: I did not do it; and if I said I did it, I would be lying. I told him the truth would go better than a lie. I said if anyone prompted you to do it, you had better tell about it. I think Spence said you'd better tell the truth. Prisoner said: I suppose I might as well say I did it. I said, don't say you did it if you did not do it. He said: I did do it. I intended to help the prisoner in case any other person engaged in the crime. I wanted him to understand that if he told the truth it would be better for him. Prisoner was warned by both Spence and myself."

Charles Spence, the detective above referred to, deposed . as follows :

"Yule and I went to the engine house" (sc., on Tuesday). "I saw prisoner. Told him I wanted to see him to examine his boots. * * Yule asked him if he could get anyone to prove that he had not on these boots on Saturday night. Prisoner said he could get Mr. Weston, the boss. Prisoner asked Weston. Weston said he did not know. Prisoner then said: I had these boots on on Saturday. He then said: I have been telling you and the Chief (Yule) lies, and I am going to tell you the truth. He said that he put the two blocks of wood on the track. I was surprised when he made this statement. I asked him if he could read and write. He said he could. I told him to put his statement in writing, and to be careful what he stated, as it might be used for him, or against him. He then wrote and signed the paper," (sc., the one above set out.) "After he wrote the statement, I asked him if any person told him to put the blocks on the track. He said, no. Going down to the lock-up Yule asked prisoner what he did it for. He said to see the engine jump. He asked me not to put his name in the papers. * * Yule came into the office when I was examining prisoner's boots. Yule heard all that took place. * * When Yule was out he said to me that he had been telling the Chief and myself lies. He was now going to tell the truth—that he did it. He was not through stating this when Yule came. I gave him the warning just before he wrote the paper. This was after he said that he had done it. The Chief told him to be cautious. I had not warned the prisoner before he made the verbal admission. I heard Yule ask the prisoner if anyone had prompted him to do the act, and that the truth would go better than a lie. I did not hear prisoner say that he did not do it. * * I did not say, I have enough here to convict you."

In the case the learned County Court Judge added: "It

was proved that the prisoner was a person of a very low order of intellect, but capable of distinguishing between right and wrong. Statement.

I decided that the admissions might be received, and convicted the prisoner.

The question submitted to the Chancery Division of the High Court of Justice for their opinion is: Was the admission made by the prisoner properly received in evidence against him?"

The case came on for argument on June 12th, 1889, before BOYD, C., and FERGUSON, J.

A. B. Aylesworth, for the prisoner. The prisoner made the confessions under promises of benefit, or representations, by police officers that it was the best thing he could do. There is no doubt obstructions were placed on the track *Regina v. Fennell*, 7 Q. B. D. 147, is, I think, entirely undistinguishable from this case. There the prisoner was told that he "had better tell the truth." This case with others is cited in *Taylor on Evidence*, 8th ed., sec. 884.

[BOYD, C.—The confession in *Queen v. Bates*, 11 Cox 606, was very like that in this case?]

No one appeared for the Crown.

BOYD, C.:—

The case you have cited seems expressly in point, and especially should the rule be applied in this case where the prisoner is of weak mind, as here. In fact the circumstances are such as would in the case of any prisoner invalidate the admissions. The conviction should be quashed.

FERGUSON, J., concurred.

A. H. F. L.

[CHANCERY DIVISION.]

'RE GRAHAM CONTRACT.

Trusts and trustees—Legal estate—Power to sell—Implied power to take back mortgage for part of price—Power to sell with consent of certain persons—Subsequent provision that said persons were to have first option of purchase—Construction.

Under a certain will the executors were directed to sell and dispose of a farm "either at public or private sale as to them may seem best, for the best price, and on the most advantageous terms that reasonably can be obtained for the same."

Held, that the power to sell involved a power to secure part of the price by means of a mortgage on the property sold, the manner of sale being left to the discretion of the trustees.

Acting under the above power, the executors sold and conveyed the premises to certain trustees on trust for the infant children of M. G. in fee, but with a proviso that the grantees might absolutely dispose of the premises with the consent in writing of a majority of such of the children as had attained 21, and a further proviso that in case either of the grantees, or of the children on attaining 21, should desire to part with their interest in the premises, the same should be first offered to the other members of the family.

Three of the children had attained 21 years and were willing to consent to the sale.

Held, that the deed to the trustees containing apt words, might be treated as a deed of bargain and sale, vesting the legal estate in them upon the trusts mentioned, and that the right to sell existed.

Held, also, that the subsequent provision as to the children buying from one another on attaining 21, was not inconsistent with or repugnant to the exercise of the power of sale at present, but would still be operative if no previous sale were made.

Statement. THIS was a petition under the Vendor and Purchaser Act, and arose out of a certain contract entered into by the petitioners, Mary Graham, Robert Goodfellow Graham, and William Miller Graham, on March 5th, 1889, to sell the lands in question to George Richard Renfrew.

It appeared that the petitioners claimed to be grantees of the land under a deed to them, dated September 13th, 1883, from the executors and executrix of the will of Robert Armstrong, deceased. By this will which was made on October 10th, 1877, Robert Armstrong after referring amongst other things not material to be mentioned here, to a certain lease of the lands in question to William

Guthrie then outstanding and undetermined, proceeded as follows: Statement.

"I do order and direct my executors hereinafter named 'to sell and dispose of my said homestead farm' (being the lands in question) 'either at public or private sale as to them may seem best, for the best price and on the most advantageous terms that reasonably can be obtained for the same, or at some future time after the expiration of said lease as they may deem most advantageous to the said estate and the interest of my said family. And I do hereby authorise my said executors to grant good and sufficient deeds of conveyance with covenants for title of said lands, and do hereby also empower and direct my said executors to invest the proceeds derived from the sale of said farm on good and sufficient mortgages on real estate, and to pay the interest accruing annually or otherwise according to the provisions of this my will unto the parties entitled thereunder.'"

On September 13th, 1883, the executors and executrix under this will executed the deed under which the petitioners claimed title, which first recited the will, and that the grantors had agreed to sell the land in question to the petitioners for \$13,000, part to be paid in money, and a mortgage back to be given for the balance, and that the petitioners had agreed after payment of the said purchase money, including the mortgage, to hold the lands unto the sole and only use and benefit of the infant children of the petitioner, Mary Graham, and then proceeded as follows:

"Provided, however, that the parties of the second part" (the petitioners) "may well and absolutely dispose of said lands with the consent in writing of a majority of such of the children of said Mary Graham as have attained the age of twenty-one years.

"Now, this indenture witnesseth that the parties of the first part" (the executors and executrix of Robert Armstrong), "by virtue of the power and authority to them given in and by" (the said will), "and in consideration of the sum of \$13,000, etc., have granted, etc., and by these presents do grant, etc., unto the said parties of the second part, their heirs and assigns forever" (the lands in question), "and also all the estate, etc., which the said testator, Robert Armstrong, had in his life time, and at the time of his decease, and which the said parties of the first part, or either of them have or hath, by virtue of the said last will and testament. To have and to hold the said land and premises unto the" (grantees), "their heirs and assigns forever upon trust, subject to the aforesaid reservations, unto the sole and only use, benefit and behoof of (the said infant children of Mary Graham), "as tenants in common, each holding one undivided one-seventh part thereof, their heirs and assigns forever.

Statement. It is herein further provided, that in case either of the parties of the second part hereto, or either of the said minors, on attaining the age of twenty-one years should desire to sell and dispose of, or otherwise part with their interest in the said land, the same shall be first offered to the other members of the family, or to such of them as may desire to purchase the same before selling to a stranger."

Only three of the infant children referred to in the deed had at the time of these proceedings attained their majority, but these three were willing to consent to the sale. The purchaser, however, raised the objections (1), that the petitioners had not under the said deed the legal estate in the lands; and (2), that under the provisions of the will and deed they could not, even with the consent in writing of a majority of the now adult children, make a good title in fee to the said lands to the respondent. On the other hand the petitioners submitted that they had with the consent of a majority of the adult children, the power to sell and absolutely dispose of the lands.

The motion came up for argument on May 8th, 1889, before BOYD, C.

A. Morphy, for the vendor, referred to *Mitchell v. Smellie*, 20 C. P. 389.

S. G. Wood, for the purchaser. The executors had no estate under the will, but only a power to sell. There was no power to allow part of the price to remain on mortgage. The deed of September 13th, 1883, conveyed an estate in fee to the infants: Dart on Vendor and Purchaser, 6th ed., p. 89; Farwell on Powers, p. 453. If the estate is not retained in the infant children, the intent to purchase in the family should be carried out: *Re Young*, 9 P. R. 521; Sugden on Powers, 8th ed., pp. 103, 140; Lewin on Trusts, 8th ed., p. 209; *Seaton v. Lunney*, 27 Gr. 169; *Long v. Anderson*, 30 C. P. 516; *Re Bingham and Wriggleworth*, 5 O. R. 611.

Morphy, in reply, cited Leith's Williams Real Property, p. 112.

May 13th, 1889. BOYD, C. :—

Judgment.

Boyd, C

Treating the instrument of September 1883, as a deed of bargain and sale, which may well be done as it contains apt words, and is for valuable consideration, then the use is executed by the Statute of Uses in the bargainees, so that the legal estate vests in them to hold upon the trusts mentioned; *Mitchell v. Smellie*, 20 C. P. 389.

They are thus trustees of the legal estate, but have power reserved in the instrument to sell upon consent of the majority of the infants who have attained twenty-one years. Three being of age and willing to consent, I think the right to sell exists, and that the subsequent provisions as to the children buying from one another on attaining twenty-one years, is not inconsistent with or repugnant to the exercise of the power of sale at present. That provision would still be operative if no previous sale is made. The only other point raised on the petition or argued was, that the executors had no right to sell as they did and take back a mortgage for part of the price. But the will enables the executors to sell the farm at public or private sale as to them may seem best for the best price, and on the most advantageous terms that can reasonably be obtained. It may have been the best way of selling to let part of the price outstand on mortgage. They do not attempt to mortgage instead of selling. There is a *bond fide* sale as the petition states, "for the full value of the lands," and the power to sell involves a power to secure part of the price by means of a mortgage on the property sold, when the manner of sale is left to the discretion of the trustees: *Thurlow v. Mackeson*, L. R. 4 Q. B. 97.

Upon the two points submitted in sec. 4 of the petition. I find in favour of the vendors.

If no arrangement has been made as to costs, these should follow the result and go to the vendors.

A. H. F. L.

[CHANCERY DIVISION.]

RE CENTRAL BANK.

MORTON AND BLOCK'S CLAIMS.

Banks and banking—Deposit receipts—Negotiability—Estoppel—Bank Act R. S. C. ch. 120, secs. 43, 65.

An incorporated bank, by its cashier, issued deposit receipts in the following form: "Received from the sum of \$, which this bank will repay to the said or order, with interest at 4 per cent. per annum, on receiving 15 days' notice. No interest will be allowed unless the money remains with this bank six months. This receipt to be given up to the bank when payment of either principal or interest is required."

Held, that it was competent under the Banking Act R. S. C. ch. 120, to issue such deposit receipts, and that even if they did not possess all the incidents of promissory notes, yet being meant to be transferred by endorsement, they were so far negotiable as to pass a good title to a *bona fide* purchaser for value, taking without notice of any infirmity of title.

But *semble*, that these deposit receipts were negotiable instruments under which the holders were entitled to recover as upon a promissory note made by the bank.

Voyer v. Richer, 13 L. C. Jur. 213, 15 L. C. Jur. 122, L. R. 5 P. C. 461, specially referred to.

Statement.

THIS was a motion by way of appeal from the ruling and certificate of the Master in Ordinary whereby he disallowed certain claims made by G. D. Morton and Hugo Block, respectively, in the winding-up proceedings of the Central Bank of Canada. The claims were made upon deposit receipts of the bank, and the circumstances, which were similar in both cases, may be briefly stated as follows:

E. S. Cox, carrying on business as Cox & Co., obtained a deposit receipt from the Central Bank of Canada, dated the 18th of October, 1887, for the sum of \$6,000 in the following form:

No.

THE CENTRAL BANK OF CANADA, }
TORONTO, 18th October, 1887. }

\$6000.

Received from Messrs. Cox & Co. the sum of six thousand dollars, which this bank will repay to the said Cox & Co., or order, with interest at four per cent. per annum on receiving fifteen days' notice. No interest

will be allowed unless the money remains with this bank six months. Statement.
This receipt to be given up to the bank when payment of either principal or interest is required.

For the Central Bank of Canada.

A. A. ALLEN,

Cashier.

Ent'd A. B. ORD,

Acc't.

The words, "or order," in the above, were written in and initialled by the cashier.

Cox endorsed and transferred the receipt to G. D. Morton for the purpose of raising money upon it, at the same time obtaining an advance from Morton of the sum of \$3,500 upon the security of it. About ten days afterwards Morton called upon Allen, the cashier of the Central Bank, to notify him of the transfer, and to have the necessary and proper entries made in respect to it; and, further, to see that it was all right. The necessary entries were then made, as appeared by the books, of the transfer to Morton, and Allen informed him that it was all right.

It was also claimed on behalf of Morton that some months after this, and after the suspension of the bank, which was on November 15th, 1887, in fact after the winding-up order, which was made on December 3rd, 1887, (a) Cox, being indebted to Dr. Morton to a considerable amount, told him that he might hold the deposit receipt as security not merely for the \$3,500 advanced as before mentioned, but also as security for a certain other indebtedness, the combined amounts of which exceeded \$6,000.

The \$3,500 was advanced on October 19th, 1887, the other indebtedness having existed prior to that time. Dr. Morton therefore claimed to be paid the whole amount of the deposit receipt.

A deposit receipt, in precisely the same form and for the same amount, \$6000, was issued by the Central Bank to Cox & Co. on the same date, October 18th, 1887, and on

(a) The order of December 3rd, 1887, was the preliminary winding-up order. The final winding-up order was made on December 18th, 1887.

REP.

Statement. October 28th, 1887, was endorsed and transferred to Hugo Block as security for an advance of \$3000 then obtained from him upon it. Of this \$200 was afterwards paid on account, and Block now made his claim upon the deposit receipt, and sought to recover the amount of the balance due to him upon it.

There was no notice given by this claimant to the bank of the transfer of this receipt to him prior to the suspension of the bank.

These claims were duly filed with the liquidators, and were disputed by them.

It further appeared from the evidence which was given that it was the duty of the cashier, Allen, to issue deposit receipts countersigned by the accountant, and that the issue of such receipts pertained entirely to the office of cashier, and that neither the president or directors, or other officers of the bank, except as above, took any part in the same: that it was not customary with banks for them to do so, and that as a matter of fact, in the case of this bank it was not done.

It also appeared from the evidence that Allen had issued a number of other receipts to Cox & Co. for the purposes of raising money upon them for the bank, and that he had also, from time to time, theretofore issued such deposit receipts, and transferred them to other banks for the same purpose.

The president, vice-president, and directors of the Central Bank were examined, and all stated that Allen had no authority as cashier to issue deposit receipts without the cash being actually deposited at the time, and the liquidators contested the liability of the bank upon the ground that it was a breach of the duty of the cashier, and that he had no authority so to issue them.

The learned Master disallowed both claims, giving the following as his reasons for so doing:

"The Bank Act, R. S. C. 120, makes a distinction between 'bills of the bank intended for general circulation,' (sec. 43) which are limited in proportion to the amount of its unimpaired capital (sec. 40), and must be

received at par at any of its branches (sec. 41,) and are a first charge upon its assets in case of insolvency (sec. 79), and other bank securities named in sec. 43, and assignable as provided in that section, and deposits which are regulated by sec. 65. Statement.

"Prior to the enactment of the provisions in sec. 65 banks had been accustomed to issue deposit receipts, and in 1869 the Court of Common Pleas held that such deposit receipts were not negotiable instruments in equity any more than law: *Mander v. Royal Canadian Bank*, 20 C. P. 125, and 21 C. P. 492. That case was decided under provisions in the Royal Canadian Bank's charter similar to those in sec. 43 of the Bank Act. In 1872 the clause now incorporated in sec. 65 of the Bank Act was passed (35 Vic. ch. 8, secs. 3 and 4.) The subsequent cases of *Bank of Montreal v. Little*, 17 Gr. 313, and *Lee v. Bank of British North America*, 30 C. P. 255, in Ontario, and *Voyer v. Richer*, 13 L. C. Jur. 313, in Quebec, are to the same effect as *Mander v. Royal Canadian Bank*, *supra*; and since these decisions Parliament has re-enacted the clauses upon which the decisions were based. The case of *Caldwell v. Merchant's Bank of Canada*, 26 C. P. 294, shews that the holder of a cheque drawn against a deposit account in a bank acquires no equitable assignment as against such deposit.

"It has also been held that making a non-negotiable instrument payable to order will not change its character on the ground that it is not competent to a party to create, by his own act, a transferable right of action on a contract: *Crouch v. Credit Foncier of England*, L. R. 8 Q. B. 374.

"The judgments referred to are consistent with *Pearce v. Crenwick*, 2 Ha. 286, 7 Jur. 340; although some remarks in the case of *Richer v. Voyer*, L. R. 5 P. C. 461, indicate that the Judicial Committee considered there was high authority in favour of a different conclusion.

"In deference, therefore, to the decisions of our Courts, I must hold that these deposit receipts are not negotiable securities: that they are assignable as choses in action, *Dickson v. Swansea Vale, etc. R. W. Co.*, L. R. 4 Q. B. 44. I say nothing as to whether the assignee takes them subject to the equities existing between Cox and the Central Bank, or whether these deposit receipts held by Dr. Morton and Mr. H. Block are contracts which come within any of the clauses of the Winding-up Act relating to fraudulent preferences, as neither question was argued before me.

"In the Morton and Block cases I find, on the evidence, that the two deposit receipts of \$6,000 each were issued by the Central Bank to Cox without any moneys being deposited by him, but for the purpose of enabling him to procure legal tenders in consequence of the bank having had to redeem a prior deposit receipt for \$12,000.

"The evidence as to Cox giving any legal tenders to the bank for these deposit receipts is too unsatisfactory for me to make a finding that he did. His own evidence may be read both ways, and there is no trace of any such payment procurable from the books of the bank, and the bank officer who was called on the point, after I expressed my doubts respecting the evidence, was unable to say whether any cash came into the bank for

Statement. them or not. The deposit receipt seems to be a contract without consideration within section 68. The result, therefore, is that the claims of Morton and Block are disallowed."

The claimants now appealed from this ruling, and asked for an order that their claims should be allowed, with the costs incurred of and incidental to the same, before the Master, and of this motion, on the grounds that their claims were duly established, and that the Master's ruling was contrary to law and the evidence, and that the claimants had fully established that they were *bonâ fide* holders of the deposit receipts, and creditors of the bank, and entitled to be paid as such, and that the bank and the liquidators were estopped by their acts and conduct both in law and in equity from denying the claims.

The appeals in respect to both claims came up for argument together on May 23rd, 1889, before BOYD, C.

G. H. Watson, for the appellants. My contention is that the deposit receipts are negotiable instruments, and did not pass subject to equities; but if not negotiable, I submit, on the facts disclosed, the bank is estopped from denying that Cox & Co. had deposited the money covered, and the liquidators are also estopped, and must account to Cox & Co.'s transferee; and, further, I say the money was actually deposited. The Master finds that Cox was agent of the bank for negotiating these deposit receipts. The bank was in the habit of using deposit receipts for other purposes than to represent moneys actually deposited at the time, viz., to borrow money upon. Evidence was given that this was not unusual with bankers, and that the deposit receipts would, as a matter of banking, be treated as negotiable. [BOYD, C.—Must not you show a universal custom in order to make deposit receipts negotiable that would not otherwise be negotiable?] This bank has always treated them as negotiable. Some were retired by Mr. Campbell himself when interim liquidator. Throughout the whole course of the bank's dealings the negotiability of these de-

posit receipts has been recognized, and they have been paid Argument.
 and redeemed without objection. The receipts are negotiable instruments. In *Mander v. Royal Canadian Bank*, 20 C. P. 125, the question arose on the form of the pleadings. There the deposit receipt contained no promise to pay. Here it does. There it was to pay to John Mander without more; here they are payable to Cox & Co. or order. See, also, *Saderquist v. Ontario Bank*, 14 O. R. 586. In *Richer v. Voyer*, 13 L. C. Jur. 213, S. C. 15 L. C. Jur. 122, L. R. 5 P. C. 461, 475, the opinion is expressed that the document there was negotiable, although that opinion was not necessary to the decision. *Lee v. Bank of British North America*, 30 C. P. 255, also were decided on a question of pleading. I refer, also, on the subject of negotiability, to *Bank of Montreal v. Little*, 17 Gr. 313; *Barnes v. Ontario Bank*, 19 N. Y. 152; *Pardee v. Fish*, 60 N. Y. 265; *Frank v. Wessels*, 64 N. Y. 155; *Cooke v. State National Bank of Boston*, 52 N. Y. 96; *Bellows Fall Bank v. Rutland County Bank*, 40 Verm. 377; *Moore v. Gano*, 12 Oh. (O. S.) 30; *Weir on Banking*, p. 123; *Miller v. Austin*, 13 How. 218. See, also, *Morse on Banking*, 3rd ed., s. 299. Randolph on Commercial Paper, p. 106, sec. 89, comes to the same conclusion, that the negotiability of such an instrument depends on its form. I do not contend that Block should recover more than the amount advanced. But Morton should recover the full amount of his receipt: *Shaw v. Port Philip, etc., Gold Mining Co.*, 13 Q. B. D. 103; *Bickerton v. Walker*, 31 Ch. D. 151. If the original conduct of the company was such as to justify the public in presuming that the instrument was regularly issued, the holder of such an instrument has a superior equity, and the company is estopped from setting up the irregularity: *Re Romford Canal Co.*, 24 Ch. D. 85; *Ex parte City Bank*, L. R. 3 Ch. 758; *Webb v. The Commissioners of Herne Bay*, L. R. 5 Q. B. 642; *Re Agra & Masterman's Bank*, L. R. 2 Ch. 391; *Re Blakely Ordnance Co.*, L. R. 3 Ch. 154; *Re Northern Assam Tea Co.*, L. R. 10 Eq. 458; *Easton v. London Joint Stock Bank*, 34 Ch. D. 95; *Cavanagh on Securities*.

Argument. 2nd ed., pp. 28, 40, 78, 80, 389; Grant on Banking, 4th ed., p. 130; *Miller v. Austen*, 13 How. 218; *Banking Act*, R. S. C. ch. 120, s. 43. As to the powers of the cashier, I refer to Waterman on Corporations, vol. 1, p. 450; *West St. Louis Savings Bank v. Shawnee County Bank*, 95 U. S. 557; Story on Agency, 9th ed., p. 196; *Houldsworth v. City of Glasgow Bank*, 5 App. Cas., at p. 326; *Barwick v. English Joint Stock Bank*, L. R. 2 Ex. 259; *MacKay v. Commercial Bank of New Brunswick*, L. R. 5 P. C. 394. The costs of the contestation were considerable, and we should get them.

Meredith, Q. C., contra. The claim, as presented by Morton, does not proceed on the ground of negotiability. At any rate the deposit receipts were not negotiable: *Voyer v. Richer*, 13 L. C. Jur. 213; *Patterson v. Poindexter*, 6 Watts & Serg. 227; *Lebanon Bank v. Mangan*, 28 Penn. 452; *London Savings Fund Society v. Hagerstown Saving Bank*, 36 Penn. 498; *Goodwin v. Roberts*, 1 App. Cas. 476. The thirty days' notice had to be given by Cox & Co. Then the provisions as to interest are opposed to negotiability: *Smilie v. Stevens*, 39 Verm. 315. Block, we say, was put on enquiry. It is only in the absence of circumstances that would cause enquiry that a person can invoke the doctrine of estoppel. As to a company being estopped from denying negotiability: *Re Natal Investment Co.*, L. R. 2 Ch. 255, 358; *Dixon v. Bovill*, 3 Macq. Sc. App. 1, 16. The only cases in which any deposit receipts are produced with the words "or order" written in are those which passed through the hands of Cox.

[BOYD, C.—That would only affect the question how far there had been a general course of dealing in the country which would enlarge the negotiability of the instruments.]

If a company puts out a document which, on the face of it, they represent as a negotiable instrument, they cannot deny that it is negotiable. This is as far as the law goes. See *Crouch v. Credit Foncier of England*, L. R. 8 Q. B. 374; *Re Fine Arts Society v. Union Bank of London*, 17 Q. B. D. 705. Again, the claimants are practically suing on a gratuitous contract.

[BOYD, C.—If they cannot stand in a higher position than Cox, that will apply. It all comes back to the question whether the receipts are negotiable or not.] Argument.

I submit that in any event Morton can only claim for the actual advance; and as these claimants have claimed for the full amount of the deposit receipts, they should not get all their costs, even if they do succeed as to part.

Watson, in reply. The New York cases cited, particularly *Miller v. Austen*, 13 How. 218, refer to the Pennsylvania cases, where alone is any doubt expressed as to negotiability. As to the form of the document, there is, I submit, no uncertainty: *Walker v. Roberts*, 1 C. & M. 590; *Clayton v. Gosling*, 5 B. & C. 360; *Pearce v. Creswick*, 2 Ha. 286; *Rumball v. Metropolitan Bank*, 2 Q. B. D. 194. There is no doubt Block and Morton *bond fide* advanced the money. Block proves on a claim of \$6,000. On this he is entitled to recover, though not entitled to be paid more than he has actually advanced: *Bank of Toronto v. Cobourg, Peterborough & Marmora R. W. Co.*, 7 O. R. 1, on debentures may also be cited. If the deposit receipts are not negotiable as notes, yet they may be so as to give a right of action to the holders, and an equitable title not subject to derogation because of any infirmity in Cox & Co.'s title.

May 28th, 1889. BOYD C.:—

Bank certificates of deposit, payable to the order of the depositor, are in common use in the United States, and are, to some extent, in use in Canada. With one exception the legal character of such instruments has not been presented for decision in Canadian Courts; but in the adjoining country the current of authority is uniform in all the States (barring Pennsylvania), and to this effect, that they are negotiable securities, possessing most, if not all, of the incidents of promissory notes. The one case in Canada which was cited, and I have not been able to find more, is *Voyer v. Richer*, 13 L. C. Jur. 213; 15 L. C. Jur. 122; L. R. 5 P. C. 461, where the instrument was in substantially the same form as the present, which runs thus:

Judgment. [Here the learned Chancellor set out the receipt, *ante*
Boyd, C. p. 574.]

The other was in these terms, "A. O. Richer has deposited in this bank, at four per cent interest, the sum of \$2000, payable to the order of Dame Marie Anne Ste. Marie, widow Voyer, upon the surrender of the present certificate. This sum, in order to bear interest, must remain at least three months in the bank, and the bearer of this certificate cannot withdraw it until after fifteen days' notice, the interest ceasing from the date of the notice." The Judge of first instance, Monk, J., held, in a very elaborate judgment, that this receipt was a negotiable instrument, the indorsement of which passed a right to the money. Upon revision this holding was reversed, the judgment of the court, consisting of three judges, being delivered by Mondelet, J., who shortly dealt with this point, and placed the rights of the parties on the insufficiency of the evidence of the plaintiff's title to hold the security against the heirs of Madame Voyer. Upon further appeal to the Court of Queen's Bench, the Court of Revision was upheld as to the failure or inadmissibility of evidence on the part of the plaintiff, but as to the other matter, Badgeley, J., says: "The mere negotiability of the deposit receipt is not in question here:" 15 L. C. Jur., at p. 126, and in the court below: 13 L. C. Jur. 123. In the court of ultimate appeal the Lords of the Privy Council affirmed the Canadian court on the ground that the evidence was insufficient to establish a valid gift to the plaintiff, and upon the matter now of main concern Sir Montague E. Smith says in effect that it was not essential to determine the vexed question of the nature of the certificate, and that it was enough for them to say of a document not in use in England, and which has been the subject of conflicting decisions in America, that there was high authority in favour of the appellant's construction of it, namely, that it was a negotiable instrument: *Richer v Voyer*, L. R. 5 P. C. 461.

The cases cited in this Province of *Mander v. Royal Can-*

adian Bank, 20 C. P. 125, 21 C. P. 492; *Lee v. Bank of British North America*, 30 C. P. 255; *Bank of Montreal v. Little*, 17 Gr. 313, and *Saderquist v. Ontario Bank*, 14 O. R. 586, were all cases in which the receipt was payable to a given person, the depositor, and so negative negotiability by their very frame.

Judgment.
Boyd, C.

The comments of the Privy Council upon the receipt in *Richer v. Voyer* are significant, and worth extracting:

"The word 'payable,' in the certificate in question, unquestionably imports a promise to pay the sum deposited, and interest at four per cent., and 'à l'ordre' are the apt words to constitute a negotiable instrument transferrable by indorsement (see Art. 2286). So far the essential attributes of a negotiable promissory note are obtained; but it was said that the provisions that the money should not carry interest unless it remained at least three months in the bank, and that the holder of the certificate should not withdraw the money until after fifteen days' notice, the interest ceasing from the day of notice, imported conditions and contingencies incompatible with the certainty required in such an instrument. The answer given to this objection was, that the provision as to interest only prescribed the time when it was to commence and cease; and that the stipulation for fifteen days' notice introduced no more uncertainty into the promise than occurs in a bill payable so many days after sight."

The Master's judgment appears to proceed upon the theory of a deposit receipt being of a non-negotiable character, and that this is also to be inferred from a comparison of the sections of the Bank Act 43 & 65 (R. S. C. ch. 120), and he refers to *Crouch v. Credit Foncier*, L. R. 8 Q. B. 374, to shew that the addition of the words "payable to order or to bearer" will not change the character of such an instrument.

The Banking Act sanctions, undoubtedly, the receiving of deposits, whether payable on demand, or after notice, or on a fixed day (p. 1627), and does express and imply the competency of the corporation to issue bills, bonds, notes,

Judgment.

BORD, C.

cheques or other instruments intended to circulate as money, or to be used as a substitute for money (sec. 83). The legislature, besides, has expressly recognized the legal transferability of deposit receipts, which would indicate that there is no public or financial policy against these documents being so framed as to circulate from hand to hand. I refer to the provision of the Stamp Act, whereby it was enacted that "Every receipt for money given by *any bank* or person, which shall entitle the person paying such money, *or the bearer of such receipt*, to receive the like sum from any third person, shall be deemed a bill of exchange, or draft chargeable with duty under this Act:" 27-28 Vic. ch. 4, sec. 3 (1864), Can.

Section 65 of the Bank Act, so far from being restrictive, has the extended effect of enabling the bank, in receiving deposits, to deal with persons otherwise unable to contract.

The controversy mainly resolves itself into a consideration of the legal effect of this instrument, as one competent for the bank to make. It was intended to be of transmissible character, and was issued avowedly for the purpose of raising money upon it by means of negotiation on the part of the apparent depositor—for I agree thus far with the Master that it was at the outset a gratuitous or voluntary contract within the meaning of section 68 of the Winding-up Act (R. S. C. ch. 129). It was endorsed by the original holder to the present claimant, who, in good faith, advanced \$3000 on the security of it. Now if it be a negotiable security, the effect of this transaction would be to pass the legal right to the money payable thereby to the claimant, the indorsee, who would have the right to recover in his own name, and free from all equities that might exist between the original holder and the bank. To the extent of the claimant's advance, he would be a purchaser for value without notice, and as between him and the bank the engagement to pay would cease to be a gratuitous contract and the section of the Winding-up Act would not apply.

What then is the nature of the instrument? Now it is of elementary knowledge that if the writing contains the essential requisites, no mere form of words is needed to constitute a promissory note. This paper is called a "deposit receipt," but it may nevertheless be a promissory note. If you find an unconditional promise to pay a certain sum in money to a person, or his order, at a time which is sure to happen, then to such a document the law will attribute the property of negotiability as a promissory note. The maxim applies, that what can be made certain is certain, so far as the interest and the notice are concerned. The provision as to interest, is that no interest will be paid if the money is drawn out within three months of the deposit: if after three months it will carry interest at four per cent. There is no uncertainty, as it is merely a matter of computation, having regard to the date of the receipt. So as to the notice of thirty days required before payment; that seems quite covered by authority. The time of payment is sufficiently certain if it be so many days after the occurrence of a specified event, which the holder can determine, such as "after sight" or "after demand." In *Clayton v. Gosling*, 5 B. & C. 360, the note was payable twelve months after notice with interest, and the C. J. said at p. 362, "The time of payment is not contingent in the strict sense of the expression; for that means a time which may or may not arrive; this note was made payable at a time which we must suppose would arrive." In *Price v. Taylor*, 5 H. & N. 540, the note was payable "two months after demand in writing." See also old cases collected in *Coleham v. Corke*, Willes R. at p. 399.

The term of giving up the receipt upon payment is merely expressing what the law would imply and may be regarded as surplusage. Besides the form of the receipt contemplates that it is to be transferable only by endorsement thereon. If it be transferred the receipt must accompany the endorsement; cannot be separated therefrom, so that endorsing involves the delivery of the certificate; and in law there could be no recovery without its production

Judgment. whoever be the claimant. I have a very strong opinion
Boyd, C. that the deposit receipt as drawn is a negotiable instrument, under which the claimants are entitled to succeed as upon a promissory note made by the bank.

But if this be not so, admitting that it does not possess all the incidents of a note, yet it was meant to be transferred by endorsement, being made payable to the order of Cox & Co. It is then governed by a line of authorities, of which *Rumball v. Metropolitan Bank*, 2 Q. B. D. 194, is a salient example. That is to say, it is so far negotiable (whether it possesses all the incidents of commercial paper or not) as to pass a good title to a *bond fide* purchaser for value, who takes without notice of any infirmity of title. This is put on the ground of representation and estoppel, and applies whether the instrument is negotiable or not in the full meaning of that term. A later case on the same line is *Re Romford Canal Co.*, 24 Ch. D. 85.

The result is that the Master's report must be set aside, and that Morton must be declared entitled to recover out of the dividends on the \$6000 deposit receipt up to the extent of \$3000, with interest and costs of contestation and appeal to be added to his debt. The evidence is too vague and unsatisfactory to enable me to give him larger relief in respect of an alleged subsequent arrangement by which he was to hold the balance of the receipt moneys as security for debts due by Cox to him before the endorsement.

As to Block's claim, that stands in the same position on the law and facts as Morton's. I do not find sufficient evidence of suspicious circumstances to justify the conclusion that he advanced his money *mala fide*. The report will also be reversed as to him, and a similar declaration made as in Morton's case.

A. H. F. L.

[CHANCERY DIVISION.]

BURKITT V. TOZER ET AL.

Will—Construction—“Heirs and representatives”—Meaning of—Next of kin.

Where a testator, by his will, in which he used the words “executor” and “executrix” several times, made a residuary bequest and devise to “the heirs and representatives of M. B.”

Held, that, having regard to the context, the next of kin according to the Statute of Distributions, and not the executor of M. B. were entitled to take under the above words.

The weight of decision shows that the word “representatives,” when standing alone, means “executors or administrators,” but, that very slight expressions in the context have turned the meaning in the other direction, to that of “next of kin.”

THIS was an action brought for the construction of the Statement will of Joseph Wenham, deceased, made on August 20th, 1867. The testator died on September 28th, 1867.

The will was as follows:

I, Joseph Wenham, formerly of Montreal, now living at Peterborough, revoking a former will, now make this my last will and testament. I give and bequeath unto my beloved wife Minerva Ann Holes all my goods and chattels and property of every description, with the exception of a gold watch, chain and seal, which I leave to my nephew J. J. Wenham, some silver plate bought of Wood & Son, which I leave to Thomas Macduff of Montreal, requesting him to be my executor, and a white marble clock, which I leave to Ellen Gilmour, wife of John W. Gilmour, to be possessed and enjoyed by her during the term of her natural life, after that to be paid over to the heirs and representatives of Mr. Miles Burkitt, formerly of the Stock Exchange, London, to make good as far as possible some heavy losses we sustained, the heaviest part of which fell on him.

I appoint my said wife to be my executrix, and request Mr. Peter Redpath or Mr. Joseph C. Lonsdale, either of them, to act as executor. I wish all my lawful debts to be paid.

Made and declared to be my last will and testament, given in North Monaghan, this 20th day of August, A.D. 1867.

The plaintiffs were two of the heirs and next of kin of Miles Burkitt, in the will referred to; the defendants were Marianne Tozer, the administratrix *ad litem* of the estate of Miles Burkitt, under an order of the Master in Chambers dated April 15th, 1889, and executrix of the executor of the will of Miles Burkitt, Gordon Trumbull, adminis-

Statement. trator of the estate of Minerva Ann Wenham, (Holes) in the will mentioned, and two other of the heirs and next of kin of Miles Burkitt.

The matter came up, on motion for judgment, on June 5th, 1889.

Hodgins, for the plaintiffs. I cite, as to the meaning of "heirs" and "representatives," *Re Gamboa's Trust*, 4 K. & J. 757; *Re Newton's Trusts*, L. R. 4 Eq. 171; *Atherton v. Crowther*, 19 Beav. 448; *Re Thompson Trusts*, 9 Ch. D. 607; *Rees v. Fraser*, 25 Gr. 253; *Re Philp's Will*, L. R. 7 Eq. 151; *Finlason v. Tatlock*, L. R. 9 Eq. 258; *Re Stevens Trusts*, 15 Eq. 110; *Keay v. Boulton*, 25 Ch. D. 212; *Doody v. Higgins*, 9 Ha. App. xxxii.; *Wingfield v. Wingfield*, 9 Ch. D. 658; *Harrison v. Spencer*, 15 O. R. 692, 695; *Briggs v. Upton*, L. R. 7 Ch. 376; *Re Thompson, Machell v. Newman*, 55 L. T. N. S. 85; *Re Horner, Eagleton v. Horner*, 37 Ch. D. 695. I rely on the above cases for the proposition that "heirs," standing as here, would be construed "next of kin," and so would "representatives," and standing together they will of course be so construed. Again, the word executor is used in other parts of the will, which is another point in favour of the same construction: *Robinson v. Evans*, 22 W. R. 199, and cases there cited. *Atherton v. Crowther*, 19 Beav. 448, and *Briggs v. Upton*, L. R. 7 Ch. at p. 383, direct attention to the consideration of what was the probable intention of the testator. We say then "heirs and representatives" mean "next of kin." The two plaintiffs, and the defendants Henry Burkitt and John C. Burkitt, and others unknown whom these last two represent in this action are next of kin.

A. Cassels, for Marianne Tozer. The cases cited do not apply. They are cases where there has been a contrast between heirs and next of kin. The principle laid down is to find what was the intention of the testator within the four corners of the will. The intention here is that the estate is to be benefited, not the heirs: *Williams on*

Executors, 8th ed. p. 1134; *Jarman* on Wills, 4th ed. Argument. vol. 2, p. 120. We say "heirs" means "trustees," being the executors and administrators of Miles Burkitt. "Heirs" is not applicable to personalty. What he meant was that the legatees through the personal representatives were to get it.

[BOYD, C.—But he knew what "executor" meant; and he evidently by "heir" did not mean "executor."]

Mounsey v. Blamire, 4 Russ. 384, speaks of "heir" being used, not to denote successor, but "legatee." *Re Crawford's Trusts*, 2 Dr. 230, is the best case I can find as to "representatives."

[BOYD, C.—If you assume intestacy on the part of Miles Burkitt, the whole is perfectly clear.]

Clearly the benefit was not to go to unknown people whom the law was to designate, but to those to whom Miles Burkitt gave it. *Leak v. Macdowall*, 33 Beav. 238, is almost exactly in point. The Courts clearly hold under such circumstances it is not unknown persons who are to get the benefit, but those who stand in the same position as the administrator stands in here. *Chapman v. Chapman*, 33 Beav. 556, in which it is said "representatives" do not mean "next of kin." *De Beauvoir v. De Beauvoir*, 3 H. L. Cas. 534, 545, is a case where "trustees or their heirs" is used, and "heirs" is there interpreted as "executors or administrators." *Re Henderson*, 28 Beav. 656, shews the effect of the word "representatives" is "executors and administrators," not "next of kin."

English, for the representative of the estate of the legatee Minerva Ann Wenham (formerly Holes), submitted his rights to direction of Court.

J. H. Macdonald, Q. C., for parties in same interest as the plaintiffs.

Hodgins, in reply, cited *Horsepool v. Watson*, 3 Ves. 383; *Booth v. Vicars*, 1 Coll. C. C. 6.

June 6th, 1889. BOYD, C.:—

A bequest to the "representatives" of a person is ambiguous, as it may apply either to executors or administrators,

Judgment. who represent him legally, or to the next of kin according to the Statute of Distributions, who represent him beneficially. The weight of decision is that this word standing alone is to be read as indicating executors or administrators: *Crawford's Trusts*, 2 Drew. 234. Very slight expressions, however, in the context have turned the meaning in the other direction.

BORD, C.

In *Walker v. Marquis of Camden*, 16 Sim. 232, Shadwell, V.C., held, where the testator had used the words "executors or administrators" five times in the will, it would be singular to say that where he departs from those words, and uses the term "legal representative or representatives," he meant "executors or administrators." For that reason alone, he held that in the will before him "representative" did not mean "executor," and therefore that it must of necessity mean "next of kin." We find the same collocation of words in the present will. The testator uses "executor" or "executrix" in three places of his short will, and in the bequest now in question he speaks of the "heirs and representatives of Miles Burkitt." Then, in this will "representatives" is coupled with the word "heirs." This, when applied to personalty, would require a very different context to render it synonymous with "executors." Here the context shews that it is meant to be equivalent to next of kin, according to the construction which obtained in *Re Gamboa's Trusts*, 4 K. & J. 757. A bequest "to the heirs of my late partner, for losses sustained during the time that the business of the house was under my sole control," was there held to signify a benefit to the next of kin. Very much in the same spirit are the words used by this testator, in which he gives to the heirs and representatives of Miles Burkitt, "to make good, as far as possible, some heavy losses we sustained, the heaviest part of which fell on him." Again, it is another circumstance, slight it is true, but bearing in the same way as the others, that the plural, "heirs and representatives," is used, whereas Miles Burkitt appointed but one executor by his will.

The testator intends his bequest to go beneficially to

those persons who represent in law the deceased Miles Burkitt, and not a bequest to the executor of Miles Burkitt, taking as trustee for those entitled under the will of Miles Burkitt. (Compare <i>Re Newton's Trusts</i> , L. R. 4 Eq. 173, with <i>Leak v. Macdowall</i> , 33 Beav. 238, and <i>Long v. Watkinson</i> , 17 Beav. 471.)	Judgment. <u>Boyd, C.</u>
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I am thus led, with reasonable certainty, to a conclusion in favour of the plaintiffs, upon the construction of this will. It is a proper case for costs of construction out of the estate, and also for the costs of ascertaining the fund pertaining to the testator's estate, which was done in the course of proceedings in *Re Gamble*.

Of the more recent cases, I may note *Keay v. Boulton*, 25 Ch. D. 212; *In re Thomson*, W. N. 1886, p. 130, and *In re Horner, Eagleton v. Horner*, 37 Ch. D. at p. 711.

A. H. F. L.

[CHANCERY DIVISION.]

CLARKSON V. SEVERS.

Execution—Assignment for creditors—Priority—“Completely executed by payment”—Constitutional law—Bankruptcy—Creditors Relief Act—R. S. O. 1887, ch. 124, secs. 4, 9—43 Vic. ch. 10 (O.)

A writ of *fi. fa.* against the lands of one H. had been in the sheriff's hands since 1880. In 1887 the sheriff sold under it and received the purchase money. Afterwards, and before payment over by the sheriff to the execution creditors, H. assigned for the benefit of his creditors under R. S. O., 1887, ch. 124. The assignee then claimed the money in the sheriff's hands.

Held, affirming the decision of ROBERTSON, J., that the assignee was not entitled to the money.

Per BOYD, C., R. S. O., 1887, ch. 124, sec. 9, applies to executions to which the Creditors Relief Act applies, and where distribution has to be made under that Act, and did not apply to the writ in this case; and the writ in this case was executed by the sale of the lands and receipt of the money, which then became the property of the execution creditors.

Semble, that if R. S. O., 1887, ch. 124, sec. 9, is to receive such a construction as would pass the money in a case such as this to the assignee, thus giving him a higher right than the execution debtor had, then the enactment is *ultra vires* as a bankruptcy provision.

Per FERGUSON, J., the authorities clearly shew that after receipt of the money by the sheriff, the writ was executed; and *semble*, that “completely executed by payment” in R. S. O., 1887, ch. 104, sec. 9, means voluntary or involuntary payment to the sheriff.

Sinclair v. McDougall, 29 U. C. R. 388, specially referred to.

Statement.

THIS was an action brought by E. R. C. Clarkson, as assignee for creditors of one Daniel Hayes, under an assignment executed on December 10th, 1887, pursuant to 48 Vic. ch. 26, (O.) (R. S. O. 1887, ch. 124), against the defendant, who was, during the period covered by the matters in question in this action, acting-sheriff for the county of York, to recover \$1,000 and interest, received by him under the following circumstances:—

On April 14th, 1880, the Bank of Toronto issued writs of *fieri facias* against the goods and lands of Hayes, and placed the same in the hands of the said sheriff, and under the writ against lands, which had been kept regularly renewed, the defendant seized and, on November 12th, 1887, offered for sale the equity of redemption of Hayes in certain lands in Toronto. The sale, however, proved abortive for want of bidders, and, on November 19th,

1887, the bank issued a writ of *venditioni exponas*, under which, on November 26th, 1887, the defendant sold the lands for \$1,000; \$200 of which was paid to him that day, and the balance on December 6th, 1887. At the time of the sale, the defendant, as such acting-sheriff, had in his hands other writs against Hayes's lands, all of which, however, were received by him long after the bank's writs. On December 13th, 1887, the defendant paid over to the bank \$870.92, the amount of their judgment, out of the proceeds of the said sale, taking an indemnity from the bank. Statement.

Upon the assignment to the plaintiff being executed, he at once notified the defendant thereof, and demanded payment of the moneys realized on the sale, which were still in the defendant's hands, and the plaintiff now contended that he was entitled to receive the same, for that the writ of the bank had not been completely executed by payment within the meaning of 48 Vic. ch. 26, sec. 9 (R. S. O. 1887, ch. 124, sec. 9), and that therefore the assignment to him took precedence of the writ under the said section.

In his statement of defence, the defendant set up that the bank's writ had been completely executed within the said section, and, moreover, that the Act 48 Vic. ch. 26, and particularly sec. 9, was *ultra vires* of the Local Legislature, the same being legislation in respect to bankruptcy and insolvency.

By the assignment to the plaintiff, the assignor, in the usual way, purported to grant and assign to him, "his heirs, executors, administrators and assigns, all his personal property which may be seized and sold under execution, and all his real estate, credits and effects."

The action came on for trial on April 8th, 1889, before ROBERTSON, J., at Toronto, who, at the close of the evidence, gave judgment as follows:—

ROBERTSON, J.:—

After hearing the arguments of both the parties, and reading the case of *Sinclair v. McDougall*, 29 U.C.R. 388, I

Judgment. have no doubt the words "completely executed by payment" mean by payment to the sheriff, and not by him to the judgment creditor. These moneys became the moneys of the Bank of Toronto the moment they were paid to the sheriff by the purchaser of the lands sold by him under the execution. This writ was placed in the hands of the sheriff more than eight years before the sale took place, and five years before the "Assignment Act" was proclaimed; and, while the plaintiff's contention might prevail if the sale had not taken place before the assignment, the sale having taken place, and the money having been paid over to the assignee before that time, I am of opinion that the judgment debtor has no power to affect the moneys in the sheriff's hands, and that the plaintiff took no interest in them. They were then the moneys of the Bank of Toronto. I think, therefore, the plaintiff is not entitled to recover more than the amount in the sheriff's hands, after payment of the amount due to the Bank of Toronto, and the sheriff's fees and charges against the fund, which are admitted to be \$48.18. I therefore give judgment for the plaintiff for \$48.18; and I have made this endorsement:—

I find a verdict for the plaintiff, and order judgment to be entered for him for the sum of \$48.18 and no more, holding, as I do, that the defendant properly paid over the amount of the execution in favour of the Bank of Toronto; and, this action having been brought to test the question, the plaintiff should pay the defendant the difference between Superior Court costs of defence and the plaintiff's costs, to be taxed on the Division Court scale. That is the best I can do.

The plaintiff now moved by way of appeal from this judgment, and the motion came on for argument on June 15th, 1889, before BOYD, C. and FERGUSON, J.

Millar, for the motion. We say the execution was not completely executed by payment. The sheriff received notice of the assignment, and before that he had received

the money, and he had it at that time. Then, on the Bank of Toronto giving him a bond of indemnity, he paid it over. "Payment" cannot mean payment to the sheriff; it would be an inappropriate word. He gets the money by levy, not by payment. R. S. O. 1887, ch. 65 (Creditor's Relief Act), sec. 20, distinguishes between the sheriff levying and the execution debtor paying. In *Sinclair v. McDougall*, 29 U. C. R. 388, no distinction is drawn between levying and payment. The Interpretation Act, R. S. O. 1887, ch. 1, sec. 8, subsec. 39, shows that a liberal construction should be applied. Sec. 10 of our Assignment Act, R. S. O. 1887, ch. 124, is the same as sec. 83 of the Insolvent Act of 1875, 38 Vic. ch. 16 (D.); Clarke's Insolvent Act, p. 246. The object was to give insolvent debtors the opportunity at any time before the money was actually paid over to the judgment creditor, to secure a rateable distribution among all his creditors.

[BOYD, C.—You might say the execution is executed when the money is made. The form of writ of *feri facias* says, does it not, that the sheriff is to have the money before the Justices "after the execution?" But you may argue that the writ contemplates payment over to the creditor, and that it is not completely executed until payment to him.]

Yes; until the money reaches the creditor the assignment takes precedence. This would be analogous to what was held under the section of the Insolvent Act referred to.

[BOYD, C.—The words in the Assignment Act, R. S. O. 1887, ch. 124, sec. 9, "subject to the lien," &c., for costs, may help your contention. After the money has reached the execution creditor there could be no lien.]

Then, as to the contention that the money, as soon as it reached the sheriff, belonged to the creditor, and therefore did not pass under the assignment; we say sec. 4 and sec. 9 of R. S. O. 1887, c. 124, should be read together.

[BOYD, C.—After the money had reached the sheriff, the debtor could not make any disposition of it: could he then

Argument. make an assignment? Not being an insolvent Act, how could the right to the money be divested by the assignment? This gives rise to the constitutional question, Would not the construction you contend for make the Act unconstitutional?]

T. P. Galt, contra. If sec. 9 is construed as claimed, the Act must be *ultra vires* according to *Kennedy v. Freeman*, 15 A. R. at pp. 200, 216.

[**BOYD, C.**—You mean that the judgment in that case still leaves the question whether sec. 9 is *intra vires* or *ultra vires* open for us to discuss?]

Yes. None of the cases reported with *Kennedy v. Freeman, supra*, went to the Supreme Court. *Sinclair v. McDougall, supra*, shews that money once in the sheriff's hands ceases to be the money of the debtor and becomes the money of the creditor. The Insolvent Act of 1869 amended that of 1865 to meet this decision. Sec. 4 of R. S. O. 1887, ch. 124, shews that no interest in these moneys would have passed to the assignee. They no longer belonged to the assignor within the meaning of this section. *Sinclair v. McDougall, supra*, shews the money belonged to the Bank of Toronto. *Jordan v. Binckes*, 13 Q. B. at p. 760; *Swain v. Morland*, 1 Brod. & Bing. 370, 377, are the same way. The latter expressly says that an execution is said to be "executed" when a sale has taken place (p. 377). So, too, *Harrison v. Paynter*, 6 M. & W. 387.

[**FERGUSON, J.**—But "by payment" causes the difficulty.]

"Payment" means by a voluntary payment. The word is used as applicable to both cases.

[**FERGUSON, J.**—Suppose the sheriff had levied part on goods, and had the money; and that he had a writ against lands under which he had not sold. Then the assignment would, under your argument, prevail as to the lands, but not as to the money levied from the goods.]

Morland v. Pellatt, 8 B. & C. 722, shews that after sale the sheriff becomes the debtor, and the judgment debtor is released. If my contention is not correct, I submit the Act is *ultra vires*; and our strongest argument is that the

Act should be construed in the sense which will make it constitutional. Besides, if the other contention prevails, the rights of the parties are altogether at the mercy of the sheriff. Argument.

[FERGUSON, J.—You say it could not have been the legislature's intention to make the assignment operate by accident, on moneys negligently withheld.]

Millar, in reply. We are not concerned with questions between the execution creditor and the sheriff. "Payment to the sheriff" is not a proper word to use when the sheriff makes the money by levy. The sec. 9 of R. S. O. 1887, ch. 124, shews that there is something more to be done than completing the execution by sale.

June 15th, 1889. *BOYD, C.*:—

R. S. O. ch. 124, sec. 9, applies to cases of execution where the Creditor's Relief Act applies, and in regard to which the sheriff has to administer the fund and pay over the distributive shares among the different parties entitled.

That being so, it is not applicable to a case in which the execution has its priority by virtue of sec. 3 of the original Creditor's Relief Act, 43 Vic. ch. 10, sec. 3, (O.) This writ of the Bank of Toronto being prior to 1880 in the sheriff's hands, it was executed by the sale of the land and the making of the money. That money was then the property of the execution creditor, and not of the debtor. It was therefore not assets of the debtor which he had the power to assign under sec. 4 of R. S. O. 1887, ch. 124, and the assignment in question did not pass the title in it to the plaintiff.

If it be the right construction under sec. 9 that it passed this money to the assignee for creditors, that is giving a higher right than the debtor had, and it strikes me that the provision would be *ultra vires*, as being a bankruptcy provision.

Either way the judgment should be affirmed, with costs.

Judgment. FERGUSON, J.:—

FERGUSON, J.

The writ of execution was in the hands of the sheriff long before the passing of the Creditor's Relief Act. The property was sold and the money realized by the sheriff before the date of the assignment (for benefit of creditors) to the plaintiff, but the sheriff had not actually paid over the money to the execution creditor before notice to him (the sheriff) of the assignment. The assignee, claiming to have been entitled to the money in the hands of the sheriff at the date of the assignment, sues the sheriff, relying upon the provisions of sec. 9 of ch. 124, R. S. O. 1887, which provides that an assignment for the general benefit of creditors, under the Act, shall take precedence of all judgments and of all executions not completely executed by payment. The contention is that the words "by payment" mean by payment over by the sheriff to the execution plaintiff, or party entitled.

The authorities are abundant, shewing, I think, that by the seizure and sale the property is changed, and not only so, but that by this act of sale and receipt of the money by the sheriff, the writ of execution is executed. From and after that period the writ is an *execution executed*: and if the payment mentioned in the section were held to mean payment to the execution plaintiff by the sheriff, I do not see how that could be any part of the execution of the writ, or how the execution of the writ (which was complete before) could be completed by it. If, on the other hand, it is held to mean voluntary or involuntary payment to the sheriff, one can see how the execution of the writ becomes completed by it. In this case there was a sale under the *venditioni exponas*, and the sheriff received the money; and I am of the opinion that the writ was then completely executed, and for this reason I think sec. 9 of R. S. O. 1887, ch. 124, cannot be made available by the plaintiff to enlarge the provisions of sec. 4 as applicable to the case; and under sec. 4 the property did not pass to the assignee, the plaintiff, because the right of property had

changed by the sale, and the assignor never had any Judgment property in the money realized on the sale.

ROBERTSON, J.

A. H. F. L.

[QUEEN'S BENCH DIVISION.]

LUPTON V. RANKIN ET AL.

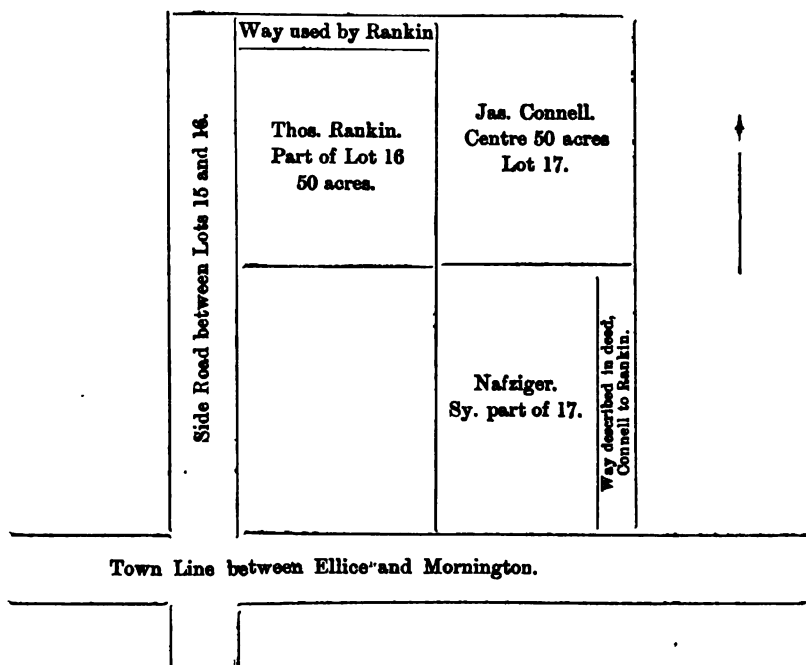
Way—Access to road—Rights of way over adjoining lots—Right of mortgagers—Way of necessity—Extinguishment by unity of possession—Revival on termination of possession.

C. conveyed to R. 50 acres of land and also a strip 20 feet wide, to the south, to give access from the 50 acres to the town line. R. mortgaged to C. the 50 acres, but not the 20 feet strip, and then conveyed the strip to N. Afterwards R. conveyed the 50 acres to his son, subject to C.'s mortgage, and on the same day gave him the occupation under an agreement for sale of the adjoining 50 acres to the west. The son mortgaged to the plaintiff the 50 acres conveyed to him. During the possession of R. and his son they got access from the east 50 acres to the side line through the west 50 acres owned by R. The agreement for sale of the west 50 acres to the son having been cancelled, and R. having refused to allow a tenant of his son of the east 50 acres access to the side line through the west 50 acres, the plaintiff brought this action against R., C., and N. for a declaration as to the existence of a right of way through the strip conveyed to N., or of a way of necessity through the west 50 acres, and for other relief.

Held, that if a right of way through the 20 feet strip did pass to C. under the mortgage to him, it was a right of way only to C., his heirs and assigns; and the existence of a right in the plaintiff to redeem C. did not give her the rights of C. until after redemption. But

Held, that the plaintiff was entitled to a declaration of the existence of a way of necessity through the west 50 acres, which was given by way of implied grant when R. conveyed to his son. The exercise of the implied grant was suspended during the time that the son had possession of the west 50 acres, but upon the termination of that possession the implied grant and the right of way under it were revived.

THIS was an action for the declaration and enforcement of certain rights claimed by the plaintiff under the circumstances set forth below, and was tried at the Stratford Assizes before MACMAHON, J., on 26th October, 1888, without a jury. The following sketch shews the position of the lands affected by the questions raised :

**Statement.**

On 17th January, 1882, James Connell conveyed to Thomas Rankin by metes and bounds the centre 50 acres of lot 17 in the 1st concession of Mornington, and the following: "Also an allowance for road of 20 feet in width from the boundary line between the townships of Ellice and Mornington, running northerly until it intersects the southern boundary of lot 17 aforesaid, the eastern limit of road being boundary between lots 17 and 18 aforesaid, containing by admeasurement three-fourths of an acre, more or less." This conveyance was made under the Act respecting Short Forms of Conveyances, was for the consideration of \$1,800, and was registered on 3rd February, 1882. The description should have read "until it intersects the southern boundary of the 50 acres of lot 17 covered by the earlier part of the description;" as it clearly related to the parcel of land forming the easterly boundary of Nafziger's part of lot 17.

On the same day Thomas Rankin made a mortgage Statement back to James Connell of "the centre 50 acres of lot 17 in the first concession of Mornington, formerly owned and occupied by James Connell," but not describing it by metes and bounds, and not including in terms the small parcel. This mortgage was made under the Act respecting Short Forms of Mortgages, and was registered on 20th January, 1882.

This small parcel of land, included in the conveyance and not included in the mortgage, was fenced on both sides, and through it ran the road which had always been used by Connell as his means of egress from the 50 acres of lot 17, while he owned and occupied it.

At the time that Thomas Rankin purchased the 50 acres of lot 17 from Connell, he was and had been for some time previously the owner of the 50 acres of lot 16 adjoining the Connell 50 acres on the west.

On the 21st June, 1882, Thomas Rankin by deed under the Short Forms Act, in consideration of \$35, conveyed to Christian Nafziger by metes and bounds the small parcel used as a roadway to the east of his land, and being the same parcel as was secondly described in the conveyance from Connell to Rankin of 17th January, 1882. This deed contained the usual statutory covenants, and was registered on 21st June, 1882.

On 9th May, 1884, James Connell assigned his mortgage from Rankin to the defendant William Connell, in whom it was vested at the time of the commencement of this action.

After Thomas Rankin purchased the Connell property, and while he held that and his own 50 acres of lot 16 as one property, he used as a means of getting out from the Connell property to the side road, a track running through some fields at the northerly limit of his part of lot 16, in the situation indicated upon the sketch. This track was a defined track, but was not in any way fenced in excepting by the fences of the large fields through which it ran.

Before the 15th January, 1885, Thomas Rankin put his

Statement.

son William Rankin in possession of the Connell 50 acres; and on 15th January, 1885, he conveyed to William Rankin that 50 acres by a deed made under the Short Forms Act, subject to the mortgage to Connell. On the same day he entered into an agreement to sell to William Rankin the 50 acres of lot 16 for \$1,200, and to convey it to him on payment of the amount, and agreed that the purchaser might occupy it until default. Thenceforth William Rankin occupied the two parcels as one farm.

On the 26th August, 1885, William Rankin executed a mortgage under the Short Forms Act to the plaintiff, Rebecca Lupton, upon the Connell 50 acres, to secure \$600.

In the same year, 1885, William Rankin leased to Henry Sage the Connell 50 acres, and he occupied it down to the time of the trial in October, 1888. Until the fall of 1887 he was in the habit of going out to the side road by the road or track at the north end of Thomas Rankin's 50 acres; he was also allowed by Nafziger to cross his farm when he wished to get out to the town line. In August, 1887, William Rankin, being in difficulties, released to his father, Thomas Rankin, his rights under the agreement for sale to him of the 50 acres of lot 16, and shortly afterwards Thomas Rankin forbid Sage from coming through that property. Since that time Sage's only means of egress was, by permission of Nafziger, through the farm of the latter.

Connell afterwards took proceedings under his mortgage and offered the 50 acres covered by it for sale, but there were no bidders, owing, it was said, to the doubt as to the means of access to it.

The plaintiff, Rebecca Lupton, in her statement of claim alleged that it was by mutual mistake of James Connell and Thomas Rankin that the right of way through Nafziger's lot was omitted from the mortgage to Connell; but that the mortgage by force of the Act respecting Short Forms of Mortgages did convey the parcel of land or a right of way over it; that Thomas Rankin, supposing he had no longer any use for this right of way by reason of his ownership of the other 50 acres adjoining the side

line, conveyed the right of way to Nafziger for the con- Statement.
sideration of \$35; that from the time Thomas Rankin acquired the Connell 50 acres, he and his son William Rankin and their respective tenants used and enjoyed, and there was appurtenant to that 50 acres, a roadway over the 50 acres of lot 16 to the side line, for travelling over with horses and cattle and on foot, and for all other purposes required for the enjoyment of the Connell 50 acres; that by the mortgage from William Rankin to the plaintiff she acquired, by virtue of the Act respecting Short Forms of Mortgages, any right of way used as part or parcel thereof; that the defendant Connell took proceedings to foreclose his mortgage; that the plaintiff was added as a subsequent incumbrancer and proved her claim; that the property was offered for sale under these proceedings, but that no purchaser could be found, because the property was without any means of access; that the defendant Nafziger knew of the mortgage from Rankin to Connell; and that the mortgagee, Connell, was entitled to a right of way under it; that by reason of the plaintiff's position as second mortgagee, she was entitled to have Connell's right to that roadway under his mortgage ascertained, or to have it declared as against all the parties hereto that a purchaser under Connell's mortgage should be entitled to use the roadway across Rankin's 50 acres of lot 16, as appurtenant to the Connell 50 acres; that the defendant Nafziger had, since this action was begun, offered to reopen the original roadway through his property upon receiving back the \$35 he paid to Rankin; but that Rankin refused to pay that amount; that the plaintiff by virtue of her mortgage was entitled to a way of necessity through Rankin's land, and to have it declared that the roadway formerly used through Rankin's land was the way of necessity to which she was entitled.

Her claims were to have the Connell mortgage reformed so as to embrace the right of way through Nafziger's land; or to have it declared that that right of way still existed as appurtenant to the Connell mortgage for the benefit of

Statement. Connell, and the plaintiff and persons claiming under them ; to have Rankin ordered to repay the \$35 to Nafziger; and to have it declared that a way of necessity has been or must be opened through Rankin's 50 acres of lot 16.

The defendant Thomas Rankin denied that any right of way was appurtenant to the Connell 50 acres, or was so at the date of the plaintiff's mortgage ; he denied that the right of way through Nafziger's lot was omitted from the mortgage to Connell by mutual mistake, and said that it was purposely omitted from it; that, having no use for that right of way after acquiring it, he sold and conveyed it to Nafziger ; that the plaintiff took her mortgage from Wm. Rankin with full notice of the release of the right of way through Nafziger's lot ; he denied the plaintiff's right to call upon him for a right of way, or to aid her in any way, and claimed the benefit of the registry laws.

The defendant Nafziger alleged that the right of way through his land was purposely omitted from the mortgage to Connell, it being intended that Rankin's roadway from the Connell 50 acres should be through his own 50 acres lying to the west of it ; that when he purchased the roadway from Thomas Rankin he knew that Thomas Rankin and those claiming under him had no need of the roadway through his property ; that he paid \$35 to Rankin in good faith, and registered his conveyance, and he claimed the benefit of the Registry Acts ; charged that the plaintiff had notice of the conveyance to him when she took her mortgage ; said that he was willing to allow the plaintiff the relief she asked on being repaid the \$35 he paid Rankin, and his costs and expenses ; and asked that, in the event of the plaintiff being declared entitled to a right of way through his land, he might be repaid this \$35, either by the plaintiff or by Rankin. The defendant Connell filed no defence.

The plaintiff joined issue on these defences.

The learned Judge reserved judgment, and on February 25th, 1889, gave judgment as follows :

For the reasons stated in the written judgment delivered Statement.
by me in the within cause, I order that judgment be entered for the plaintiff herein against Thomas Rankin and Christian Nafziger, declaring that the right of way mentioned in the second paragraph of the statement of claim, (being the one through Nafziger's lot) still exists appurtenant to the lands mentioned in the mortgage from the defendant Thomas Rankin to James Connell ; and also in the mortgage from the defendant William Rankin to the plaintiff for the benefit of the defendant Connell and the plaintiff or any vendee under their mortgages or either of them, and the heirs and assigns of the said vendee forever. I also order that judgment be entered in favour of the defendant Nafziger against the defendant Thomas Rankin for \$35 and interest at six per cent. from 21st June, 1882. I also order that the defendant Thomas Rankin do pay to the plaintiff the costs of this action, and to the defendant Nafziger his costs of defence.

The defendant Thomas Rankin moved before the Divisional Court of the Queen's Bench Division (to which the motion had been transferred) against this judgment, and his motion was argued on May 29th, 1889, before FALCONBRIDGE and STREET, JJ.

Lash, Q. C., for the motion.

Idington, Q. C., for the plaintiff.

Osler, Q. C., for the defendant Nafziger.

June 22, 1889. The judgment of the Court was delivered by

STREET, J. :—

It may fairly be gathered from the evidence that at the time he sold to Rankin, James Connell was the owner of the strip of land east of Nafziger's land, and that he was therefore using his own land as a means of access

Judgment.
STREET, J

to the town line. When he conveyed to Thomas Rankin the 50 acres, he also conveyed the fee in this parcel. When Rankin made the mortgage back to him, we are not unwilling to assume that under the provisions of the Short Forms Act, it may have been that, although the strip of land itself was not included, a right of way over the strip did pass to Connell, as a way theretofore used and enjoyed with the parcel granted; and if we were able to agree with our learned brother MacMahon that the plaintiff is entitled to the benefit of any right of way granted at this time by Rankin to Connell by means of the mortgage, we are not prepared to say that we should not have been able also to agree in most of the conclusions at which he has arrived. We are, however, compelled to the opinion that if a right of way did pass to Connell under the mortgage, it was a right of way only to Connell, his heirs and assigns. Rankin, after giving the mortgage, was owner in fee of the strip through Nafziger's place, subject only to this possible right of way in favour of Connell, his heirs and assigns. He then conveyed the fee in the strip to Nafziger, and Nafziger registered his conveyance and closed up the road, and in his turn became owner in fee of the strip subject only to the possible right of way in favour of Connell, his heirs and assigns. After this again Thomas Rankin conveyed his equity of redemption in the Connell 50 acres to his son William Rankin, and William Rankin conveyed it by way of mortgage to the plaintiff. It seems plain that Thomas Rankin could not by his conveyance to his son impose any burden upon Nafziger's land in addition to that which already existed, and as he could not himself have insisted upon a right of way through Nafziger's land in the face of his own conveyance to him, so he could not confer any such right upon his son or his son's grantees. The plaintiff has brought Connell before the Court and asks that the mortgage from Thomas Rankin to him should be rectified by making it include this strip. Connell has not appeared to ask for such a rectification. We do not see on what princi-

ple the plaintiff is entitled to ask for rectification of a mortgage in which she has at present no interest; nor how it would help her if it were rectified. If she desires to have the benefit of any rights which Connell has and she has not, she has the right to acquire them by purchasing and taking an assignment of his mortgage, but the existence of a right to redeem does not give to the possessor of it the rights of the prior incumbrancer until the redemption has actually taken place.

The plaintiff then, having no rights against Nafziger, asks that Nafziger may be ordered to reopen the right of way which he bought from Rankin, and that Rankin may be ordered to repay the \$35 to Nafziger which the latter paid him for the land. As the plaintiff has no right to require Nafziger to reopen the right of way, the claim for damages on this account, which the plaintiff sets up on Nafziger's behalf against Rankin, must fall to the ground, and the result is that Nafziger, having no interest in the action, should be dismissed from it with costs, to be paid by the plaintiff, and that Rankin should be relieved from that portion of the judgment which directs him to pay the \$35 and interest to Nafziger.

The plaintiff seems, however, to have a clear right as against Thomas Rankin to a way of necessity through his land.

Before the conveyance by him to his son, Thomas Rankin owned in fee the 100 acres; on the 15th January, 1885, he conveyed to his son the Connell 50 acres; he had before that date extinguished the right of access to that parcel through Nafziger's land by releasing it to Nafziger; and his son, the grantee, having no other means of access, was entitled to a way of necessity through the property of his father, the grantor, by way of implied grant, upon the principle "*quando aliquis aliquid concedit, concedere videtur et id sine quo res uti non potest.*"

It follows from the nature of the principle upon which the right depends, that the implied grant must be co-extensive in its duration with the ownership of the property

Judgment.
STREET, J.

Judgment. expressly granted. An implied grant of a right of way
STREET J. for a limited time would afford only a partial relief to a
grantee in fee who had no other means of access. The
express grant of a right of way for a limited time, or a
unity of possession, as distinguished from a unity of seisin,
must, upon the authorities, suspend the exercise of the
implied grant during its existence, but upon its termina-
tion the implied grant and the right of way under it are
revived. The law is thus concisely stated in the head-
note to *Thomas v. Thomas*, 2 C. M. & R. 34: "A unity of
possession of the land *a quâ* and of the land *in quâ* an
easement exists, does not extinguish but only suspends the
easement, where the party is seised in fee of the one parcel,
and possessed for the residue of a term of the other." To
the same effect are the American decisions. In Washburn
on Easements, 4th ed., at p. 685, it is said that "The unity of
title and possession of the two estates, which operates an ex-
tinguishment of an easement in the one upon or over the
other, can only have that effect where the same proprietor
has a permanent estate in both tenements not liable to be
defeated by the performance of a condition, or the deter-
mination of a determinable fee by the happening of some
event beyond his control, and where the estates cannot
be again disjoined by operation of law." See also *Tyler*
v. Hammond, 11 Pick. 193-220; *Dixon v. Cross*, 4 O. R.
465. Upon these principles, the fact that contempora-
neously with the conveyance from Thomas Rankin to his
son William Rankin of the Connell 50 acres, he entered
into an agreement to sell him and gave him the immedi-
ate right to occupy the 50 acres of lot 16, through which
the way of necessity must be taken to have passed, merely
suspended the exercise of the right of way during the
continuance of the son's right to occupy the last mentioned
50 acres. The rights which the son had in the Connell
lot, including the right to a way of necessity as against
Thomas Rankin, passed to the plaintiff under the mort-
gage from the son to her, and being still vested in her, can
be actively enforced against Thomas Rankin, now that

the unity of possession of the two parcels has been terminated. The plaintiff is, therefore, entitled to have a reasonable way set out for her and the persons claiming under her, with horses, carriages, and cattle through the 50 acres of lot 16, as against Thomas Rankin and all persons claiming under him. If the parties can agree upon the metes and bounds, they may be set out in the judgment. If they cannot, there must be a reference to the Registrar to settle them, the costs of which will be reserved to be paid by the party who appears to have refused to consent in the first place to a reasonable way. The defendant Thomas Rankin must pay the plaintiff's costs, to be taxed as if he had been, as he should properly have been, the only defendant. No relief is asked against William Rankin, and no relief that can be granted is asked against William Connell. As against Nafziger, the action should, as we have already said, be dismissed with costs.

Judgment.
STREET, J.

[QUEEN'S BENCH DIVISION.]

RE LEWIS V. OLD.

Prohibition—Division Court—Jury trial—Judge withdrawing case from jury.

In a Division Court suit a jury was demanded and called, but the presiding Judge withdrew from their consideration everything except the amount of damages to be awarded, saying that there were no facts in the case disputed, the plaintiff's evidence being uncontradicted. The jury assessed the damages and judgment was entered for the plaintiff.

Held, that where the plaintiff furnishes evidence which the Judge thinks sufficient to support his case, the case cannot be withdrawn from the jury; the mere fact that the defendant does not call evidence to controvert the plaintiff's evidence does not conclude the matter, for the jury might refuse to credit the plaintiff, and properly find a verdict for the defendant. The Judge in this case exceeded his jurisdiction by assuming the functions of the jury; and the right to have the case submitted to the jury being an absolute statutory right, the violation of it was ground for prohibition.

Statement.

THIS was an application by the defendant for prohibition to restrain proceedings on a judgment obtained by the plaintiff in the first Division Court in the county of Huron. A notice for jury had been given by the defendant, and a jury was called at the trial of the case in the Division Court, and the evidence was taken. After the evidence was closed the Judge declined to submit any question to the jury except the amount of damages. The Judge's statement of what took place at the trial is set forth in the judgment of STREET, J., *infra*. The jury assessed the damages. An application was made for a new trial, which was refused.

This application was then made for prohibition, and was argued before GALT, C.J., in Chambers, on the 27th April, 1889.

Aylesworth, for the defendant.

Campion, for the plaintiff.

May 6, 1889. GALT, C.J.:—

Judgment.

GALT, C.J.

I do not question the correctness of the opinion expressed by the learned Judge as regards the evidence ; but, as the case was tried by a jury, the defendant had a right to insist that every question should be submitted to them, and a Judge has not the power in a Division Court suit to withdraw the case from them. The learned Judge has power to instruct the jury as to the verdict, and if they act contrary to his instructions he can grant a new trial, but he cannot withdraw the case from them ; the verdict must be theirs. This appears from the form of the oath administered to the jurors. Section 167 of the Division Courts Act, R. S. O. ch. 51, enacts : “ Five jurors shall be empanelled and sworn to do justice between the parties whose cause they are required to try, according to the best of their skill and ability.”

This motion must, therefore, be absolute to stay proceedings on the judgment, and to set the same aside. There will be no costs on this motion, as I am not aware that this question has been previously before the High Court.

The plaintiff appealed from this decision, and his appeal was argued before a Divisional Court composed of FALCONBRIDGE and STREET, JJ., on the 22nd May, 1889.

Shepley, for the appeal. The Judge presiding in the Division Court was right in what he did. No facts were in dispute, and he, in substance, instructed the jury to find a verdict for the plaintiff, and assess the damages. That is the course that would have been taken in the High Court ; and see sec. 304 of the Division Courts Act, R. S. O. ch. 51. It was misdirection at the most, and prohibition does not lie for misdirection : *Re Western Fair Association v. Hutchinson*, 12 P. R. 40 ; *Siddall v. Gibson*, 17 U. C. R. 98.

Aylesworth, contra. This was not a case of misdirection. The Judge withdrew from the jury everything

Argument.

except the damages, and therefore usurped the functions of the jury, which he had no jurisdiction to do, and for doing which he can be prohibited. Upon the question what are the functions of the Judge and what of the jury in Division Courts, contrast secs. 156, 166, 167, with sec. 70. This is a proper case for prohibition: *Regina v. Judge of Lincolnshire County Court*, 20 Q. B. D. 167; *Scott v. Morley*, *ib.* 120; *Re McLeod v. Emigh*, 12 P. R. 450; *Re Johnson v. Therrien*, *ib.* 442.

Shepley, in reply, referred to *Robinson v. Lawrence*, 7 Ex. 123, as to the powers of the Judge of an inferior Court.

June 22, 1889. STREET, J.:—

This was a motion on behalf of Edward N. Lewis to the Divisional Court by way of appeal from an order of the Chief Justice of the Common Pleas Division, dated 6th May, 1889, prohibiting further proceedings under a judgment rendered by the junior Judge of the County Court of the county of Huron, in a cause in which Edward N. Lewis was plaintiff and George H. Old was defendant.

The cause was brought in the Division Court to recover \$70 for an alleged breach of warranty of title to a horse sold by the defendant to the plaintiff. The defendant, within the proper time, gave a notice requiring the case to be tried by a jury, and a jury was duly empanelled and sworn to try it. The learned Judge before whom the trial took place has made a written statement of the facts, which was read subject to objection, and which may, at all events, be looked at in the light of an admission. He says:

"The case presented by the evidence before me and the jury was that the plaintiff bought from the defendant a horse; that afterwards one Hunter claimed and demanded it from plaintiff under a 'lien note,' and delivery being refused, Hunter procured the horse to be taken from plaintiff's stable, and delivered to him (Hunter), who at the time of trial still held it. The 'lien note' shewed on its

face some interlineations, which on the trial Hunter, who drew it, explained, swearing they were made before the note was signed. Though the defendant was called as a witness on his own behalf, no fact in the plaintiff's case was controverted by defendant's evidence. I allowed defendant's counsel to address the jury, seeing that the question of damages would have to be submitted to them, but on the close of his address I interposed and announced my intention to submit only the question of damages to the jury, as there were no facts in the case disputed. The plaintiff's counsel, acquiescing in my view, did not address the jury. It appeared to me that the defendant's only object in having the jury was to speculate on the chance of obtaining a verdict through sympathy, and against evidence. In my opinion justice was done, except that I would probably have given plaintiff more damages on the evidence."

Judgment.
STREET, J.

The defendant's counsel swears that he objected to the charge and to the course pursued by the learned Judge, but that his objections were overruled; that he afterwards applied for a new trial, and that his motion was dismissed. The defendant then applied to the Chief Justice of the Common Pleas Division for a prohibition, which was granted for the reasons set forth in his judgment, *supra*. From this judgment the defendant appealed to the Divisional Court.

The grounds of appeal were that the Judge of the Court below was acting within the jurisdiction conferred upon him by the Division Courts Act and Rules; and that he had power to withdraw the case from the jury.

It appears plain that a party who is entitled to give and does properly give a notice desiring to have his case tried by a jury in the Division Court, is entitled to have it tried by a jury in the same way and to the same extent that a party to an action of slander or malicious prosecution in the High Court is entitled to have it tried by a jury; but the rules governing trial by jury are equally applicable to an action in the Division Court tried by a

Judgment. jury as to an action in the High Court tried by a jury.
STREET, J. For instance, if the plaintiff should produce no evidence from which a jury could properly find in his favour, it would be the duty of the Judge to rule that there was no case to go to them, and to nonsuit the plaintiff, and his decision, being entirely within his jurisdiction, could not furnish ground for a prohibition. But when the plaintiff furnishes evidence which the Judge thinks sufficient to support his case, then I cannot see how the case can be withdrawn from the jury. The mere fact that the defendant does not call evidence to controvert the plaintiff's evidence by no means concludes the matter, for the story told by the plaintiff may be of so unlikely a character, or may be surrounded by circumstances so suspicious, that the jury might refuse to give credit to it, and might properly find a verdict for the defendant. If the Judge here had submitted the whole case to the jury with a charge, however strong, that it was their duty under the circumstances to find a verdict for the plaintiff, there would have been no remedy by prohibition, but he says distinctly that he announced his intention to submit only the question of damages to the jury, as there were no facts disputed.

In doing this he assumed the functions of the jury, and there has, therefore, been no finding of facts by the only tribunal having, under the circumstances, authority to decide them. The right to have the case submitted to the jury being an absolute statutory right, the violation of it clearly affords reason for the issue of a prohibition.

I think the appeal should be dismissed with costs to be paid by the appellant.

FALCONBRIDGE, J.:—

I concur. The learned Chief Justice whose order is appealed from points out the peculiar form of oath administered to the jury in the Division Court.

A learned County Court Judge has called my attention to the fact that the party requiring a jury, and paying the

clerk the proper fees for their expenses under secs. 154, 155, cannot, whether he succeeds or not, recover these fees from the opposite party. He must pay for this luxury, irrespective of the merits of his case, or the result of the action. It may be that this gives him some especial claim to have his case tried out by the tribunal which he has selected—and paid for.

Judgment.
STREET, J.

[QUEEN'S BENCH DIVISION.]

REGINA V. THE COUNTY OF WELLINGTON ET AL.

Constitutional law—Insolvency legislation—Powers of Dominion Parliament—33 Vic. ch. 40, (D.)—Intra vires—B. N. A. Act, sec. 91, sub-sec. 21—Assessment and taxes—Exemption from taxation—R. S. O. ch. 193, sec. 7, sub-sec. 1.

Held, that the statute 33 Vic. ch. 40 (D.), which recites the insolvency of the Bank of Upper Canada, vests the property of the insolvent estate in the Crown as trustee for the creditors, and provides for its realization in order that the debts may be paid, is within the powers of the Dominion Parliament, under sub-sec. 21 of sec. 91 of the B. N. A. Act; and that, although the interest of a mortgagor could, that of the Crown, acquired under such Act, as mortgagee of certain lands, could not, be sold for arrears of taxes, being exempt from taxation under R. S. O. ch. 193, sec. 7, sub-sec. 1.

Decision of ROBERTSON, J., varied.

THE statement of claim alleged that on 28th February, 1877, the defendant John Anderson mortgaged to Her Majesty the Queen of No. 16 and the north half of lot 17 in the 12th concession of the township of Luther, to secure payment of \$1,701, and that in December, 1886, a final order for the sale of the said lands was made in proceedings instituted upon the mortgage against the mortgagor; that on 13th October, 1885, the treasurer of the county of Wellington sold the land in question to the defendant Cutten for arrears of taxes alleged to be due thereon, and that a conveyance was made to him by the treasurer in pursuance of such sale on the 14th October, 1886; that on 17th November, 1886, Cutten conveyed the same lands to the defendant Quirt, who

Statement.

covenanted with the defendant Emily L. Anderson, the wife of John Anderson, the mortgagor, to hold the land in question for her subject to the payment by her of \$450; and that by deed dated 15th April, 1887, Quirt conveyed to the defendant George McFadden the north half of lot 17 in the 12th concession of the township of Luther, being a portion of the said lands; and that on the same day McFadden made a mortgage back to Quirt of the same lands to secure \$500. The statement of claim charged that Cutten bought the lands in question as trustee for the mortgagor, Anderson, who allowed the taxes to remain unpaid with intent to defraud the plaintiff, and that Quirt took the conveyance for the benefit of John Anderson with the like intent, and asked to have the various conveyances declared void for these reasons, and because the sale was void as against the Crown. The various defendants denied any fraud or unfair dealing and insisted that the tax sale was valid.

The action was tried on 17th April, 1889, at the Toronto sittings before ROBERTSON, J., without a jury, and judgment was given by him on 11th May, 1889, dismissing the action with costs as against the county of Wellington, but in favour of the plaintiff as against the defendants John Anderson and Emily L. Anderson with costs, and as against the defendants Quirt, McFadden, and Cutten without costs, setting aside the tax sale and the various conveyances and mortgages founded upon it, and declaring the plaintiff's mortgage to be a first charge upon the property.

The defendants, other than the county of Wellington and Cutten, moved against this judgment before the Divisional Court at the Easter Sittings, 1889, asking that the action should be dismissed with costs, upon the ground that judgment should have been so entered, and that the tax sale was valid and the conveyances under it should have been declared valid.

The motion was argued before FALCONBRIDGE and STREET, JJ., on the 29th May, 1889.

Bain, Q. C., for the motion.

Argument.

Lash, Q. C., and H. L. Dunn, contra.

The following authorities were referred to: *Church v. Fenton*, 28 C. P. 384; 4 A. R. 159; 5 S. C. R. 239; *Attorney-General v. Midland R. W. Co.*, 3 O. R. 511; *Leprohon v. Ottawa*, 2 A. R. 522; *Kennedy v. City of Toronto*, 12 O. R. 211; *Regina v. Guinness*, 3 Ir. Ch. Rep. 211.

June 22, 1889. The judgment of the Court was delivered by

STREET, J. :—

It was admitted at the trial that the lands in question had been patented and had become vested in the Bank of Upper Canada at the time of its failure; that the Crown, claiming them under ch. 40 of 33 Vic. of the Dominion, had sold them to the defendant John Anderson, who had made the mortgage back for \$1,701, balance of his purchase money.

Counsel for the defendants raised the question before us as to the power of the Dominion Parliament to pass the Act above mentioned under which the Crown claims title, but we have not had the benefit of an argument upon the point. That Act recites the insolvency of the Bank of Upper Canada; that its assets are vested in trustees, who have made but little progress in the settlement of its affairs; that the Dominion of Canada is by far its largest creditor; and that it is expedient in the interest of all persons concerned that provision should be made for a more speedy winding-up of its affairs, and for making a fair and equitable adjustment and settlement of the claims of all the creditors of the bank; it then vests in Her Majesty, for the Dominion of Canada, all the property and assets of the bank, transfers to Her Majesty all the powers of the trustees under the trust deed, and provides for the

Judgment. sale of the assets, the settlement of the claims of creditors,
STREET, J. and the disposal of the surplus.

Sec. 91, sub-secs. 15 and 21, of the B. N. A. Act confers upon the Dominion Parliament exclusive legislative authority in regard to (15) Banking, Incorporation of Banks, and the issue of paper money; (21) Bankruptcy and Insolvency; and counsel for the plaintiff argued that the validity of the Act in question might be supported under either of these sub-sections.

We prefer to consider it as having been passed under the authority of sub-sec. 21. Under that sub-sec. there is no doubt of the authority of the Dominion Parliament to pass a general Insolvency Law which should vest in the assignee the property of an insolvent debtor in any Province of the Dominion to which it should be made applicable, because without such a power the authority to pass such a law would be useless. The right to pass a general law of the kind must also involve the power to pass a special law to meet a particular case; the Local Legislatures, having no power to deal with insolvency legislation at all, are debarred from passing either a general or special Act, and the right must, therefore, exist in the other Legislature. The Act which is questioned by the defendants seems to contain the essential elements of insolvency legislation; it recites the insolvency, vests the property of the insolvent estate in the Crown as trustee for the creditors, and provides for its realization in order that the debts may be paid. We are, therefore, of opinion that it was within the powers of the Dominion Parliament and that by it Her Majesty became owner of the lands in question.

- It was urged, however, that even though vested in the Crown by means of the mortgage from Anderson, these lands, including the interest of the Crown as mortgagee, might be sold for arrears of taxes, and that the treasurer's deed operated to vest the fee simple in the purchaser free from the mortgage. It was not disputed that if the land had been vested in the Crown free from any trust, or subject to a trust for Indians, it would have been exempt

under sub-sec. 1 of sec. 7 of the Assessment Act, ch. 193, R. S. O., but it was argued that under the terms of that section land vested in Her Majesty upon any other trust was not exempt. We think it must be taken that the first sentence in the section is wide enough to cover all property vested in or held by Her Majesty, whether upon trust or free from trust, and that the words which exempt from taxation all lands held by her or any other person upon trust for Indians must be taken as having been added, not by way of limiting the earlier part of the clause, but by way of greater caution. It is unnecessary, therefore, to consider the question raised by plaintiff's counsel as to the power of the Provincial Legislature to tax Dominion property. The intention of this sec. 7, sub-sec. 1, is perhaps further shewn by sec. 137 of ch. 193, which provides that "The taxes accrued on any land shall be a special lien on such land, having preference over any claim, lien, privilege, or incumbrance of any party *except the Crown.*"

The interest of the defendant John Anderson in the land was, however, subject to taxation, and to be sold for arrears of taxes, and the sale and treasurer's deed operated to pass that estate. The judgment moved against appears to have gone too far in setting the sale aside *in toto*, and we think it should simply have declared that as against all the parties to this action the mortgage from the defendant John Anderson to Her Majesty forms a first charge or lien upon the lands in question, notwithstanding the sale for taxes and the conveyance by the treasurer and the other conveyances mentioned in the statement of claim, and that the treasurer's deed only operated to pass the estate subject to the mortgage. The disposition made of the costs by the judgment need not be interfered with, and the costs of this motion will form part of the costs of the cause, as it was not contended by the plaintiff that the judgment should be upheld in those respects in which it has been varied.

Judgment.
STREET, J.

[QUEEN'S BENCH DIVISION.]

MAGEE V. GILMOUR ET AL.

Landlord and tenant—Verbal lease of land—Expiry of term upon day certain—Notice to quit—Sub-lease—Overholding tenants—Warrant of distress—Creation of new tenancy—Payment of rent.

Since the Judicature Act the result of a verbal lease of real property for more than three years, to continue until and expire upon a day certain, where the tenant has taken possession, is that he is bound to give up possession at the end of the stipulated period without any notice to quit. And where McC., the tenant for such a term, sublet to the defendants, but not for any definite period;

Held, that their term also expired upon the day the original tenancy expired, and when they continued in possession thereafter they were overholding tenants.

The plaintiff, the landlord, issued a distress warrant for rent of the premises in question after the expiry of the term and the defendants, without the concurrence of McC., who had tried to dislodge them and refused to receive rent from them after the expiry of the term, paid the rent demanded to the plaintiff's bailiff, not as being due by themselves, but as being due by McC., to the plaintiff. The warrant recognized McC. as being tenant on the day of its date, some months after the expiry of the term, but did not recognize the defendants' rights in any way. In an action of ejectment the defendants disclaimed being tenants under the plaintiff and insisted that they were still in under McC.

Held, that the payment of the rent did not under the circumstances establish a new tenancy between McC. and the defendants, even if McC. ever became the tenant of the plaintiff after the expiry of his original term, which was not shewn.

The plaintiff after the expiry of the term served on the defendants a written notice to quit, in which they were recognized as his tenants.

Held, that, having disclaimed being tenants to the plaintiff, the defendants were not entitled to notice to quit, and if they were, the one they received was sufficient.

Statement.

ACTION to recover possession of real property, tried before FERGUSON, J., at Ottawa, on the 26th April, 1889.

The facts were as follows:

On the 15th September, 1882, the plaintiff, being owner of a building in Ottawa with a basement under it, made a verbal lease of the basement to one McCaffery, for a term to expire on the 15th November, 1887, at \$150 a year. McCaffery entered and occupied until the 30th May, 1885, when he sublet the basement, excepting a small room in which coal was kept, to John Gilmour, at \$150 a year, payable quarterly on the 1st September, December, March, and June. McCaffery and Gilmour entered into a written

agreement specifying these terms, but not stating the time for which the tenancy was to continue. Afterwards the rights of John Gilmour were transferred with the consent of McCaffery to the defendant Ada L. Gilmour, the wife of the defendant Robert P. Gilmour. Mrs. Gilmour paid to McCaffery her rent up to the 1st September, 1887, and on the 1st December, 1887, tendered him another quarter's rent as being due 1st December, 1887, which he refused on the ground that his tenancy under Magee had expired, and that the right of Mrs. Gilmour expired at the same time. The Gilmours, however, retained possession, and refused to go out, insisting that McCaffery was a tenant from year to year under Magee, and that they were tenants from year to year under him; that their rights, although dependent upon McCaffery's, could not be put an end to until his had been regularly terminated by a proper notice to quit. Statement.

On the 6th March, 1888, the plaintiff served upon each of the defendants Robert P. Gilmour and Ada L. Gilmour a notice to quit in the following words: "I hereby give you notice to quit and deliver up possession of the cellar and premises, with the appurtenances, situate, &c., *which you hold of me as tenant thereof*, on the fifteenth day of September next, or at the expiration of the year of your tenancy which shall expire next after the end of one half year from the service of this notice."

On the 21st June, 1888, the plaintiff issued a distress warrant directing his bailiff to "distrain the goods and chattels in the cellar or basement of the building now or latterly in the tenure or occupation of William McCaffery, situate, &c., for the sum of \$93.75, rent due to me for the same on the 15th June, 1888."

The defendants, without McCaffery's concurrence, paid the rent mentioned in this distress warrant to the plaintiff's bailiff, not as being due by themselves, but as being due by McCaffery to the plaintiff.

After the 15th November, 1887, the plaintiff made a new lease to McCaffery of the portion of the building not occupied by the defendants, under which he entered and

Statement. held it. The writ of summons in this action was issued on the 20th November, 1888.

At the trial the defendants' counsel disclaimed being tenants under the plaintiff, and insisted that they were still in as tenants to McCaffery.

The learned Judge after hearing argument at the conclusion of the case dismissed the action with costs, on the ground that McCaffery's tenancy was not determined in such a manner as to bind Gilmour, and refused to order the defendants to pay any rent or compensation for occupation to the plaintiff, saying to his counsel: "You disclaim being landlord to Gilmour; then you cannot have rent; make McCaffery pay you."

The plaintiff moved to set aside this judgment, and to enter a judgment for the plaintiff for possession of the land, and for \$150 for use and occupation, or rent, or for a new trial, and the motion was argued before the Divisional Court (FALCONBRIDGE and STREET, JJ.), on the 3rd June, 1889.

J. H. Macdonald, Q.C., for the plaintiff. If the tenant remains in possession for the whole term of a verbal agreement, he must go out at the end of it, and no notice to quit is required. The Gilmours could be in no better position than McCaffery, and he was either tenant at will or by sufferance after the expiry of the term. I refer to *Tilt v. Stratton*, 4 Bing. 446; *Tress v. Savage*, 4 E. & B. 36; *Martin v. Smith*, L. R. 9 Ex. 50. A notice to quit was, it is true, served on the defendants on the 6th March, 1888, which informed the defendants that they held of the plaintiff; but as the defendants repudiate the tenancy, they cannot take advantage of this. Nor can the warrant of distress affect the plaintiff, when the defendants deny the tenancy.

W. H. Barry, for the defendants, referred to *Mellor v. Watkins*, L. R. 9 Q. B. 400; *Pleasant v. Benson*, 14 East 234.

June 22, 1889. STREET, J. :—

Judgment.

STREET, J.

The fact that the verbal agreement between Magee and McCaffery was for a tenancy to continue until and expire upon the 15th November, 1887, was not in any way disputed, and the result of such a letting appears to be that the tenant is bound to give up possession at the end of the stipulated period without any notice to quit: *Tilt v. Stratton*, 4 Bing. 446; *Tress v. Savage*, 4 E. & B. 36; *Martin v. Smith*, L. R. 9 Ex. 50; *Walsh v. Lonsdale*, 21 Ch. D. 9.

The language of Sir George Jessel, M.R., in the latter case has been quoted more than once. He says, at p. 14: "There is an agreement for a lease under which possession has been given. Now since the Judicature Act the possession is held under the agreement. There are not two estates as there were formerly, one estate at common law by reason of the payment of the rent from year to year, and an estate in equity under the agreement. There is only one Court, and the equity rules prevail in it. The tenant holds under an agreement for a lease. He holds, therefore, under the same terms in equity as if a lease had been granted, it being a case in which both parties admit that relief is capable of being given by specific performance." See also *Allhusen v. Brooking*, 26 Ch. D. 559; *In re Maughan*, 14 Q. B. D. 956.

These authorities do not appear to have been called to the attention of my brother Ferguson.

When McCaffery sublet to Gilmour he was, therefore, tenant for a term to expire on the 15th November, 1887, and could not sublet for a longer period; so that as against the plaintiff the defendants had no greater rights than they had against McCaffery, and their term also expired on the 15th November, 1887. In order to succeed against the plaintiff in this action the defendants must shew a new tenancy, either express or implied, commencing on or after the 15th November, 1887, which has not yet expired; and this I think they have failed to do. They have dis-

Judgment. claimed being tenants to the plaintiff, and cannot, therefore, claim to be entitled to any notice to quit from him. If they were in a position to claim notice to quit, it is shewn that they received one which is sufficient.

STREET, J.

The distress warrant recognizes McCaffery as being tenant of the cellar on the 21st June, 1888, when it is dated, but does not recognize the defendants' rights in any way. They were notified after the 15th November, 1887, to quit, and were proceeded against as overholding tenants, as they in fact were, because the right of their landlord to the property had expired; they have since remained in possession in spite of the efforts of McCaffery and the plaintiff to dislodge them. It is impossible for them to contend that they have become tenants to McCaffery since the 15th November, 1887, unless it be by payment of the rent distrained for by the plaintiff, and I am of opinion that that circumstance is not sufficient. If we treat the plaintiff as prevented from denying that McCaffery was his tenant of the cellar in June, 1887, and the defendants as being at that time overholding tenants under McCaffery, the seizure by the plaintiff of the goods of these overholding tenants under a distress against McCaffery, cannot operate to create a new term as between them and him. They were holding against his will, and had no right to be there, and cannot better their position by an act to which he was not a party. Therefore, in spite of the payment of his rent to the plaintiff, they remained overholding tenants as between him and themselves.

I am of opinion, however, that the facts do not shew that McCaffery ever became tenant of the basement to the plaintiff after the 15th November, 1887. The plaintiff says that in distraining he acted under legal advice: the probability is that the advice was given under the mistaken idea that the lease to McCaffery had not terminated, for there is nothing whatever to shew that a new tenancy was created after the 15th November, 1887. It is not shewn that the distress warrant ever came to McCaffery's knowledge, and there is nothing to shew that he ever in

any way varied from his position that his own rights, as well as those of the defendants, terminated on the 15th November, 1887. Judgment.
STREET, J.

The defendants, having been wrongfully in possession of plaintiff's property, are liable to mesne profits: these should be calculated from the 18th June, 1888, to the date of the trial at the rate of \$150 a year, and the plaintiff should have judgment for possession and mesne profits, and for his costs of the action and motion.

FALCONBRIDGE, J. :—

I concur.

Pleasant v. Benson, 14 East 234, is distinguishable, because in the case at bar no notice to quit is necessary.

Mellor v. Watkins, L. R. 9 Q. B. 400, decides that no voluntary act on the part of the tenant by which his own interest might be determined could put an end to the interest which he had created in his sub-lessee.

That principle has no application to the present case.

[QUEEN'S BENCH DIVISION.]

SMITH V. JAMIESON.

Husband and wife—Breach of promise of marriage—Infancy of defendant—Ratification at majority—R. S. O. ch. 123, sec. 6—Evidence—Corroboration—R. S. O. ch. 61, sec. 6—Contract not to be performed within a year—Statute of Frauds.

In an action for breach of promise of marriage the defendant admitted a promise but said that he was an infant when he made it, and that there was no ratification in writing after majority, as required by R. S. O. ch. 123, sec. 6. The plaintiff insisted that there was no engagement between her and the defendant until he became of age on the 20th August, 1887. The jury found that the promise to marry was first made on that day. There being evidence to sustain that finding, and also evidence upon which the jury might have found a previous promise, the Court refused to interfere with the finding.

There was evidence to corroborate the statement of the plaintiff that an engagement to marry existed, such evidence being not inconsistent with the precise engagement sworn to by the plaintiff as having been entered into on the 20th August, 1887.

Held, that this evidence satisfied the requirements of R. S. O. ch. 61, sec. 6, and it was not necessary that it should go so far as to negative the promise which the defendant admitted he made before majority.

The plaintiff swore that "it was to be a year's engagement, and we were to be married in the following August."

Held, that this was not an agreement not to be performed within a year, and was therefore not void under the Statute of Frauds, although not in writing.

Statement.

ACTION for breach of promise of marriage.

The statement of claim set up a breach of promise by defendant to marry plaintiff when he should attain the age of twenty-two years, and made the following special claim for damages for breach of contract:

Paragraph 4. At the time of the said promise by the defendant to marry the plaintiff, she was compelled to earn her living as a clerk or saleswoman, and after the said promise, to wit, in the month of August, 1887, the defendant requested her not to work any more, and promised that he would pay her what would be equivalent to such wages as she could earn from then until the time of their marriage, and thereupon the plaintiff ceased working, and has not since been employed.

In his statement of defence the defendant denied the allegations contained in the statement of claim, and said

that at the time of the alleged contracts he was an infant within the age of twenty-one years, and that there was no ratification in writing of the said contracts after he attained the age of twenty-one years ; and he further pleaded and claimed the benefit of the Statute of Frauds. Statement.

The cause was tried at Ottawa before MACMAHON, J., and a jury on the 23rd March, 1889.

The learned Judge submitted questions to the jury, which were answered as follows :

1. Was the promise by the defendant to marry the plaintiff made on the 20th of August, 1887, or before that date ? A. On the 20th of August, 1887.

His Lordship—I told you to say, was there any promise to marry before that date at all ? A. No.

2. Did the defendant, Jamieson, induce Miss Smith to refrain from taking an engagement in Bruce's shop, promising to allow her \$3 a week ? A. Yes.

3. If the plaintiff, Miss Smith, was induced and promised by the defendant, was such promise made after the 20th of August, 1887 ? A. Yes.

4. What damages do you allow the plaintiff as to the breach of promise of marriage ? A. \$1,000.

5. What compensation do you allow the plaintiff for the breach of contract mentioned in questions 2 and 3 ? A. \$3 per week from the 20th of August, 1887, to the date of breach.

Upon these answers the learned Judge ordered that judgment should be entered for the plaintiff on the causes of action arising out of the promise to marry and the breach thereof for \$1,000 ; and in respect of the cause of action stated in the 4th paragraph of the statement of claim (as set out above) for \$217, with costs.

The defendant moved on notice for an order setting aside the answers of the jury to the questions submitted to them, and the judgment directed to be entered thereon, and directing judgment to be entered for the defendant or a new trial to be had, on the grounds :

Statement.

1. The damages are excessive.
2. The answers of the jury are against the weight of evidence.
3. Upon the evidence, any promise of marriage made by the defendant to the plaintiff was made while the defendant was an infant, and what took place between the parties after he attained his majority was at most a mere ratification, and did not amount to a fresh promise, and not being in writing, no action can be brought thereon.
4. There was no corroboration of plaintiff's evidence that a substantive promise was made on 20th August, 1887.
5. It was an agreement not to be performed within a year, and should, therefore, have been in writing.
6. As to the sum of \$217, defendant is entitled to judgment on the foregoing grounds and also on the ground that no consideration was shewn for the promise.
7. If it is alleged that the consideration was the promise to marry, the promise made upon that consideration should have been in writing.

June 3, 1889. The case was argued before the Divisional Court (FALCONBRIDGE and STREET, JJ.)

Shepley supported the motion.

McVeity shewed cause.

The facts, arguments, and authorities, appear in the judgments.

June 22, 1889. FALCONBRIDGE, J.:—

The plaintiff, a girl of nineteen, went to work in defendant's father's shop on the 2nd December, 1885, and remained there a year. In the spring of 1886 defendant asked permission to visit plaintiff at her father's house. The permission being accorded, defendant availed himself of it, and called with more or less frequency up to the

time when the plaintiff says the engagement took place, Judgment.
viz., the 20th August, 1887. She says he spoke of marriage Falconbridge,
before that on one occasion, when she told him that she J.
would enter into no engagement till he was of age.

It was admitted that defendant attained his majority on the 20th August, 1887.

On the 20th August, 1887, between six and seven in the morning, she says he asked her if she intended to make him happy, to promise to be his wife, and that she gave the promise, and he then gave her an engagement ring, and they went on a steam-boat to a pic-nic. Her sister and mother and brother-in-law were all in the house on that morning. She further says that she took the ring upstairs to shew to her mother, who was not well, and she saw defendant and her brother-in-law shaking hands when she was going upstairs. It was to be a year's engagement, and they were to be married in the following August. He was thenceforward received as her suitor, and there was no abatement in his attentions until 5th February, 1889, when he wrote a letter which he says "I know will surprise you, but still it is for the best," breaking off the engagement.

She says that before and after the engagement there was talk between them about her going out to work again, and that she mentioned two situations which she thought of applying for, and he said that his people objected "right along" to her going out to work, and told her not to go; that he would give her what she had received in his father's store, saying that he wanted her to stay at home and learn as much as she could about housekeeping. She did not join the Methodist Church because he asked her not to do so, but she went with defendant to the Concession street Baptist Church.

It is satisfactory to find that the plaintiff's counsel disavows putting forward the religious aspect of the case as a ground for special damage.

On cross-examination she said that at Christmas, 1886, he gave her a present and after Christmas he told her he

Judgment. loved her and asked her to be his wife, and she told him
Falconbridge, she liked him as a friend. In the autumn of 1886 she
J. told him she would not marry him till he was of age,
because she knew his people were against his entering into
anything till he was of age; she told him she would enter
into no engagement and he was at liberty to stop visiting
or do as he liked. He brought a ring for her to try on the
11th August, 1887, and it was too large and he took it
away and she did not see any ring until the 20th August,
and that was her engagement ring. She did not tell him
on 11th August she would be his wife; if he was willing
to stay away, he could. It was after the engagement in
1888 he asked her not to join the Methodist Church; it was
the time some revivalists were in Ottawa. She says "we
were converted together."

Albert Watts, a brother-in-law of plaintiff, says that
some time after the 20th August, 1887, defendant was at
tea at his place with plaintiff, and defendant said, "Never
mind, Paully, when we get married I will make it up to
Albert and Nellie for their kindness in having us down
here;" and that on the morning of defendant's coming of
age he congratulated defendant on coming of age, and
being engaged as well, between six and seven in the morning.
(Plaintiff and defendant had both said in his presence that
they were not to be engaged till he had come of age.)
Defendant shook hands with witness and asked if
witness had seen the ring, and witness said, "no."

He gives other ample corroboration of a *promise to marry*.

On cross-examination he says that defendant never be-
came recognized by the family as a suitor for her hand till
after the 20th August.

Mrs. Leitch, a sister of plaintiff, congratulated him on
the 20th on the engagement, and on his being of age.

Defendant's examination in chief is to be commended
for its brevity, and discloses the whole defence.

"Q. When did you ask Miss Smith to be your wife?
A. I asked her in January, 1887."

"Q. Did she accept you on that occasion? A. She did." Judgment.

There is an express finding of the jury that the promise by the defendant to marry the plaintiff was made on the 20th August, 1887, and that there was no promise to marry before that date at all. Falconbridge,
J.

There was ample corroborative evidence if the jury chose to believe the witnesses: *Costello v. Hunter*, 12 O. R. 333; *Davis v. Bomford*, 6 H. & N. 245; *Parker v. Parker*, 32 C. P. 113. The defendant himself admits a promise, though not the one of the 20th August.

Thus is excluded the application of R. S. O. ch. 123, sec. 6, (requiring the ratification of a promise made during non-age to be in writing and signed by the party) and of the cases founded on it, and on the similar English statute, like *Cozhead v. Mullis*, 3 C. P. D. 439.

The promise was to marry her "in a year." This is not, I take it, a contract not to be performed within a year. I so decide on the implied authority of the cases which hold that a contract to serve for one year, the service to commence on a day subsequent to that on which the contract was made, is a contract not to be performed within a year within the meaning of the Statute of Frauds, sec. 4: *Britain v. Rossiter*, 11 Q.B.D. 123; *Cawthorne v. Cordrey*, 13 C. B. N. S. 406.

See also *Lawrence v. Cooke*, 56 Me. 187, where the promise was to marry within four years; it not appearing that the parties understood that the promise was not to be performed within one year, the promise is not within the statute: *Clark v. Pendleton*, 20 Conn. 495.

As to the \$217, I have above summarized the plaintiff's evidence. The talk which she relies on as constituting the contract took place before and after the engagement, i.e., before and after defendant became of age. This part of the judgment, in my opinion, cannot stand. It was objected to on other grounds, and we should not be astute to uphold it, inasmuch as a jury in a breach of promise case might as a measure of precaution give it twice over; once as under the special contract, and again in their general assessment of

Judgment. damages, although I am bound to say that in the present
Falconbridge, case my brother MacMahon was most clear and explicit in
J. his charge, with a view to prevent this result.

I cannot say that the damages are otherwise excessive.

As my brother Street and I do not agree as to the \$217,
the result is that the motion will be dismissed with costs.

STREET, J. :—

I agree in the conclusions that have been arrived at by
my brother Falconbridge upon the defendant's motion.

There was evidence upon which the jury might find that
the promise to marry was first made on the 20th August,
and although the circumstances were such that the jury
might have well found a previous promise, they have
chosen to give credit to the plaintiff's statement that she
refused to give any promise to marry the defendant until
she gave it on the day when he arrived at the legal age of
discretion, and we cannot take upon ourselves to say that
their finding is wrong.

The defendant further objects that the agreement proved
by the plaintiff was one not to be performed within
a year, and was void under the Statute of Frauds because
not in writing. The plaintiff's evidence with regard to
the matter is this: She is asked, "At the time the engage-
ment was made on the 20th August, 1887, when was the
marriage to take place?" and she replies: "It was to be a
year's engagement, and we were to be married in the fol-
lowing August." If the engagement was to be for a year
from the date of the agreement, it was not an agreement
which was not to be performed within a year; it was on
the contrary one which the law required should be per-
formed within the space of a year from the time it was
made: *Cawthorne v. Cordrey*, 13 C. B. N. S. 406.

I do not think we should hold that the latter words of
the plaintiff's answer are intended to qualify the earlier
statement that it was a year's engagement.

It was further urged that under sec. 6 of ch. 61 R. S.

O. it was necessary that the plaintiff should furnish evidence to corroborate, not only the fact of the promise, but the date when it was made, when the date is material, as it is in the present case. That section provides "that no plaintiff in an action for a breach of promise of marriage shall recover a verdict unless his or her testimony is corroborated by some other material evidence in support of the promise." The plaintiff here swore that she and the defendant on the 20th August agreed to marry one another: she produced, in support of this, abundant evidence to corroborate her statement that an engagement to marry existed between her and the defendant, such evidence being not inconsistent with the precise engagement which she swore to. This I think is all that the statute requires, and it was not necessary that the corroborative evidence should go so far as to negative the promise which the defendant admitted he made before his majority.

As to the defendant's agreement to pay to the plaintiff \$3 a week in consideration of her not taking an engagement, the jury have found that such a promise was made by the defendant to the plaintiff after he became of age. The request which he made was probably one which would not have been made had the defendant not expected that the plaintiff would be his wife, but the consideration proved is distinct from the consideration of the intended marriage. The defendant did not say that if the plaintiff would refrain from taking the proposed employment he would marry her, but if she would so refrain he would pay her \$3 a week. The jury were carefully instructed by the learned Judge to keep the damages arising from this promise entirely distinct from the damages arising from the breach of promise to marry, and they have accordingly assessed them separately. I think it is impossible for us to say that they have not kept the two questions distinct; if the case were to go down to trial again, I do not know how the matter could be more plainly laid before the jury,

Judgment. or how the question as to the alleged promise to pay \$3 a
STEELE, J. week could be withdrawn from their consideration.

In my opinion the defendant's motion should be dismissed with costs, and the plaintiff should have judgment for the whole \$1,217 with costs.

[QUEEN'S BENCH DIVISION.]

PIZER V. FRASER ET AL.

Intoxicating liquors—Liquor License Act, R. S. O. ch. 194, sec. 11, sub-secs. (8), (14)—Petition against issue of license in polling sub-division—Form of petition—Particularity.

The Liquor License Act, R. S. O. ch. 194, sec. 11, sub-sec. (14), provides that "No license shall be granted to any applicant for premises not then under license or shall be transferred to such premises if a majority of the persons duly qualified to vote as electors in the sub-division at an election for a member of the Legislative Assembly, petition against it, on the grounds hereinbefore set forth, or any of such grounds."

More than one-half of the electors in a certain polling sub-division petitioned the licensed commissioners of the district "against the issue of any license within the bounds of said polling sub-division . . . for reasons specified in sec. 11, sub-sec. (8), of the Liquor License Act, R. S. O., or for one or more of such reasons"—not otherwise specifying any grounds or referring to any applicant or premises.

The plaintiff was an applicant for a license for premises not under license situate in the sub-division, and the question stated for the opinion of the Court was whether under sec. 11, sub-sec. (14), the presentation of the petition precluded the defendants, the license commissioners, from certifying for a license to the plaintiff.

Held, that the petition did not conform to the statute, which requires that the objection shall be to the granting of a particular license, and also that some one or more of the reasons given in sub-sec. (8) shall be set forth, or all of them specifically alleged; and, therefore, the defendants were not precluded from certifying for a license.

THE following special case was stated by the parties:—Statement.

This action was commenced on the 17th day of May, 1889, by a writ of summons whereby the plaintiff claimed a declaration that he is entitled to have issued to him a license to sell spirituous, fermented, and other manufactured liquors by retail, at his tavern, inn, house, and place of public entertainment, in the village of Essex Centre, in the county of Essex, for the year ending with the 30th day of April, 1890, notwithstanding the presentation to the defendants Fraser, Abbott, and Phillips of a petition, signed by the defendant Naylor among others, praying that no such license be granted within the limits of the polling sub-division in which the said inn is situated.

And a mandamus commanding the defendants other than C. E. Naylor to issue to the plaintiff a certificate stating that he is entitled to such license above described,

Statement.

and to direct the issue to the plaintiff of such license, pursuant to the provisions of the Liquor License Act, upon the payment by the plaintiff of the necessary license duty and the giving by him of the security required by the said Act from a tavern licensee.

And the parties have concurred in stating the questions arising for decision in this action in the following case for the opinion of the Court, and agree that the same be heard in the first instance by the Divisional Court:—

1. The plaintiff is the true owner of the business of a certain tavern, inn, house, and place of public entertainment, in the village of Essex Centre, in the electoral district of the south riding of the county of Essex, and within the limits of polling sub-division No. 3 in the said village.

2. The defendants Fraser, Abbott, and Phillips compose the board of license commissioners for the said electoral district.

3. The plaintiff prior to the 1st day of April, 1889, duly filed his petition with the inspector of licenses for the said electoral district, praying for the issue to him of a license for the year commencing on the 1st day of May, 1889, and ending with the 30th day of April, 1890, for the sale of spirituous, fermented, and other manufactured liquors by retail, at his said tavern and place of public entertainment.

4. The plaintiff's said premises were not then under license, and no licenses have been issued for several years past for the sale of intoxicating liquors in the said polling sub-division of the said village, as a by-law under the Temperance Act of 1864 was in force there until the present year.

5. The said inspector thereupon reported in writing to the defendants Fraser, Abbott, and Phillips that the plaintiff was a fit and proper person to have a license, and had in his said tavern and inn all the accommodation required by law; and that the plaintiff was known to the said inspector to be of good character and repute; and

such report was duly filed by the said defendants, and ^{Statement.} remained open to the inspection of any ratepayer of the said municipality, or any provincial officer, as required by the Liquor License Act.

6. The said defendants fixed a day, as required by the said Act, for considering applications for licenses, and the date and place of such meeting was duly published, in accordance with the provisions of the said statute.

7. The names of applicants for licenses, including the name of the plaintiff, were also duly published by the said inspector, with the place where the plaintiff proposed to sell, and all the other particulars required by the said Act.

8. More than four days before the day fixed for considering the said applications for licenses, a petition was lodged with the said inspector, and by him presented to the defendants Fraser, Abbott, and Phillips, in the words and figures following :

“PETITION.

“To the Board of License Commissioners for the License District of the South Riding of Essex :

“We the undersigned petitioners, being duly qualified electors for polling sub-division No. 2 of the village of Essex Centre, in the south riding of the county of Essex, and being qualified to vote in said polling sub-division for a member of the Legislative Assembly, do hereby petition your honorable Board against the issue of any license within the bounds of said polling sub-division of the said village of Essex Centre, for reasons specified in section 11, sub-section (8), of the Liquor License Act, Revised Statutes of Ontario, or for one or more of such reasons.

“And your petitioners will ever pray.”

And there were appended to the said petition as signers thereof the names of more than one-half the number of persons qualified to vote as electors in the said polling sub-division at an election for a member of the Legislative Assembly, and the defendant Naylor was one of the persons who signed such petition.

9. No other objection to the granting of the license prayed for by the plaintiff was made in any way, and the defendants Fraser, Abbott, and Phillips state that, unless prevented by the fact of the said petition being so pre-

Statement. sented to them, they are prepared to approve of the plaintiff's said application for the license aforesaid, and to grant to him the necessary certificate to entitle him to the issue of the said license.

The question for the opinion of the Court is, whether under sub-section (14) of section 11 of the Liquor License Act the presentation of the petition of electors as aforesaid precludes the said defendants from granting to the plaintiff their certificate that he is entitled to the license aforesaid.

And judgment is to be entered in the action in favour of plaintiff or defendants in accordance with the answer to the above question.

May 27, 1889. The special case was argued before the Divisional Court, (FALCONBRIDGE and STREET, J J.)

Aylesworth, for the plaintiff.

J. J. Maclaren, for the defendants.

June 22, 1889. FALCONBRIDGE, J. :—

R. S. O. ch. 194, sec. 11, sub-sec. (14), provides as follows :

"(14.) No license shall be granted to any applicant for premises not then under license or shall be transferred to such premises if a majority of the persons duly qualified to vote as electors in the sub-division at an election for a member of the Legislative Assembly, petition against it, on the grounds hereinbefore set forth, or any of such grounds."

By sub-section (8), the objections which may be taken to the granting of a license may be one or more of the following :

(a) (Relates to the character of the applicant);

(b) (Relates to his premises);

(c) "*That the licensing thereof is not required in the neighbourhood, or that the premises are in the immediate vicinity of a place of public worship* * * * ."

If ten or more electors of the sub-division, under sub-section (7,) exercise their right and privilege to object by petition to the granting of the license, provision is made for hearing the parties: sub-sections (9), (10), (11), and (12); and for decision by the board: sub-section (13).

Judgment.

Falconbridge,
J.

But by sub-section (14) it appears that those opposing the granting of the license (being a majority, as aforesaid), can decide the matter *ex parte*, without any trial at all, and the plaintiff complains that this is anomalous and unjust, and should be viewed with strictness.

The petition here against the issue of the license is, "for reasons specified in sec. 11, sub-sec. (8), of the Liquor License Act, R. S. O., or for one or more of such reasons."

Reason (c) is, "That the licensing thereof is not required in the neighbourhood, * * "

Is sub-section (14) anything more than a short way of shewing, by the expressed opinions of the majority of the sub-division, as set out in the petition, that the licensing is not required in the neighbourhood, instead of leaving it as a question for the decision of the board?

I was at first inclined to think that was the result, and if the petitioners had based the opposition distinctly on sub-section (c), the answer might have been in the affirmative, although considerations would have arisen as to how far "neighbourhood" and "sub-division" were interchangeable terms, or terms of equal or relatively greater import.

So too, if the petitioners had definitely assigned any one or more of the reasons given in sub-section (8), or had even assigned them all, other questions would have had to be considered.

But the petitioners have carefully abstained from assigning all the reasons or any one or more of them. There is an apparently studied vagueness about the petition which would leave it open to any and all of the petitioners to say if called to account by the applicant:

"I did not say that you were a person of bad fame and character, or of drunken habits. I did not say your premises were out of repair."

Judgment. In short, this petition does not conform to the statute, which in my opinion requires the petitioners to allege some one or more of the grounds set forth in sub-section (8), or specifically to allege all of them.

Falconbridge,
J.

In my opinion, our answer must be in favour of the plaintiff's contention.

STREET, J.:—

The plaintiff applied on 1st April, 1889, to the defendants, the license commissioners of the electoral district of the south riding of the county of Essex, for a license to sell liquor, under sub-sec. (1), sec. 11, of ch. 194, R. S. O., at his tavern in polling sub-division No. 3 of the village of Essex Centre, in that electoral district. The inspector reported favourably upon the petition, as required by that sub-section. The fact of this petition having been presented was duly advertised under sub-sec. (5) of sec. 11 more than fourteen days before the day fixed for hearing applications for licenses. After the presenting of the plaintiff's petition, and more than four days before the day fixed for hearing it, a petition was presented to the license commissioners, signed by a majority of the persons duly qualified to vote as electors in polling sub-division No. 3, in the following terms:

"To the Board of License Commissioners for the License District of the South Riding of Essex:—We, the undersigned petitioners, being duly qualified electors for polling sub-division No. 3 of the village of Essex Centre, in the south riding of the county of Essex, and being qualified to vote in said polling sub-division for a member of the Legislative Assembly, do hereby petition your honourable board against the issue of any license within the bounds of said polling sub-division of the said village of Essex Centre, for reasons specified in section 11, sub-section (8,) of the Liquor License Act, Revised Statutes of Ontario, or for one or more of such reasons."

The plaintiff's premises were not under license at the

time this petition was presented; and the question submitted by this special case is, whether the license commissioners are by law prevented from issuing a license to the plaintiff by the fact that this petition has been presented. The defendant Naylor is one of the persons who signed the petition, and was, no doubt, made a party to the action in order that the views of the petitioners might be properly laid before the Court.

Judgment.

STREET, J.

The general scheme of the 11th section of the Act, ch. 194, R. S. O. is this: When a petition is presented for the issue of a license, the inspector's duty is to ascertain and report to the commissioners whether the petitioner is a proper person to receive a license, and whether his premises are provided with the accommodation required by law. Then opportunity is given to the public to know that such an application has been made, and the inspector's report is open to the inspection of any ratepayer. If any ten or more electors (being less than a majority of those in the electoral sub-division), choose to do so, they may petition the license commissioners not to grant any license which has been applied for, upon one or more of the following grounds:

(a) That the applicant is of bad fame and character, or of drunken habits, &c.

(b) That his premises are out of repair, or not provided with the accommodation required by law.

(c) That the licensing thereof is not required in the neighbourhood, or that the premises are in the immediate vicinity of a place of public worship, hospital, or school, or that the quiet of the place in which the premises are situate will be disturbed if a license is granted.

When objection is made to the character of the applicant, he is entitled to three days' notice before the time when the commissioners intend to entertain the objection, with the object, no doubt, of giving him an opportunity of answering the objection.

By sub-section (14) of section 11, it is provided that:

"No license shall be granted to any applicant for pre-

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Judgment.
STREET, J.

mises not then under license or shall be transferred to such premises if a majority of the persons duly qualified to vote as electors in the sub-division at an election for a member of the Legislative Assembly, petition against it, on the grounds hereinbefore set forth, or any of such grounds."

It appears beyond question that under this section a majority of the electors in any sub-division have it in their power, by merely stating certain grounds as existing, and without furnishing any proof whatever, and without giving any opportunity of reply, to prevent the issue of a license to any person who applies for one in the sub-division.

Such a power, it seems to me, should be exercised strictly in accordance with the statute which confers it. The power given to the majority is not, in form at all events, a power to say generally that no license shall be granted within the sub-division: it is a power to object to the granting of any particular license which is applied for. This appears not only from the language of the sub-section, but from the fact that the grounds of objection must be stated in the petition, and must be either to the personal character of the applicant, or to the condition of his premises, or to the nature of the neighbourhood in which his premises are situate: and it not only requires that the objection shall be to the granting of a particular license, but that the grounds of objection shall be stated. The petitioners must all agree upon certain specific objections to the granting of the license applied for, and must sign a petition setting forth what are the objections alleged by them to exist. It is not sufficient for the petitioners to say generally that they want no premises licensed within the sub-division, and in that way to evade the responsibility which the statute imposes of stating clearly what their objections are.

This petition appears to have been carefully framed in such a manner as to avoid doing that which the statute requires petitioners to do in such cases. It refers to no applicant for a license, and thus enables the petitioners to

say that they did not aim it against any person or any premises. It does not even allege that all the grounds mentioned in sub-section (8) of section 11 are intended as the grounds of objection. It says, "for reasons specified in sub-section (8,) or for one or more of such reasons." This may mean that some of the petitioners consider one of the grounds, and others that different grounds exist. The Act requires that all the petitioners must petition upon the same grounds.

Judgment.

STREET, J.

Nor is it sufficient, in my opinion, to refer in the petition to the statute as shewing the objections taken. Probably not half a dozen out of the whole number of persons who signed this petition had any beyond the vaguest idea of the contents of sub-section (8) of section 11, which is referred to in the petition as containing reasons for their objection, or knew with what they were charging the plaintiff, or whether they were charging him with anything.

It is impossible to gather from the petition whether it is levelled at the plaintiff's application at all. If it is to be taken as being levelled at the plaintiff's application, then it is impossible to gather from it whether the petitioners intend to assert that all the objections specified in the 8th sub-section, or only some of them, and if only some, which of them, exist. To treat this petition as one complying with the requirements of sub-section (14) would be, in my opinion, to give to its provisions a much wider meaning than is to be gathered either from its letter or its spirit.

My answer to the question submitted by the special case is that the presentation of this petition does not preclude the defendants, the license commissioners, from granting to the plaintiff their certificate that he is entitled to the license he has asked for.

[QUEEN'S BENCH DIVISION.]

MOONEY V. SMITH.

Assessment and taxes—Sale of land for taxes—Purchase by wife of treasurer who conducted sale—Sale and conveyance void—Fraud—R. S. O. ch. 193, sec. 189.

A purchase of land at a tax sale was made nominally by one G. for the plaintiff, but was in reality made with the money and for the benefit of the plaintiff's husband, the treasurer of the county, who conducted the sale.

Held, in an action of trespass, that the treasurer's position absolutely debarred him from becoming a purchaser at the sale, and the sale and conveyance to the plaintiff were void ; and as the land remained in the hands of the persons guilty of the original fraud, the sale was not cured by the provisions of R. S. O. ch. 193, sec. 189, although it took place in 1883 and the action was not brought till 1889.

Statement. ACTION for trespass to lot 8 in the second concession of Snowden in the county of Haliburton, and cutting down and carrying away timber therefrom. The defendant by his statement of defence claimed to be owner in fee and denied the plaintiff's claim to the land in question : he also set up that the plaintiff's husband, Frederick Mooney, was the treasurer of the county of Haliburton ; that the plaintiff's only claim was under a sale for taxes of the land in question to one Garrett ; that the sale was conducted by the plaintiff's husband as treasurer, and that Garrett in fact purchased for the treasurer himself and, in pursuance of an agreement to that effect, assigned the certificate to the plaintiff on the day after the sale, and he submitted that the tax sale was void and should be declared void and be set aside.

The action was tried on 29th April, 1889, at Lindsay, before MACMAHON, J., and a jury.

The plaintiff claimed title under a deed from the warden and treasurer of the county of Haliburton, and it was shewn that taxes were in arrear at the time of the sale for a period sufficient to warrant the sale, and that the conditions precedent to the sale had been complied with. It was also shewn that the defendant, claiming to be owner adversely to the tax title, had cut timber on the lot.

On the part of the defence it was shewn that at the ^{Statement.} time of the sale, which took place on 29th October, 1883, the plaintiff's husband was the treasurer of the county of Haliburton. On the 23rd October, 1883, a letter was written by him and signed by the plaintiff to the following effect :

“ Minden, October 23, 1883.

“ REUBEN C. GARRETT.

“ DEAR SIR,

“ Will you kindly bid in for me at the adjourned tax sale on 29th the lots or some of them that I was speaking to you about, at or about the prices spoken of by us. if you can do so ? I shall rely upon your judgment in the matter. Kindly buy in your own name, as I do not want my name to appear. I will furnish the money and take your assignment of tax sale certificate, and pay you for your trouble for any lots bought by you for me.

“ (Signed)

ELIZABETH MOONEY.”

Reuben C. Garrett was bailiff of the Division Court, and on friendly terms with the plaintiff and her husband, and stated that he had discussed the matter of purchasing land at the sale both with the plaintiff and her husband before the sale ; that he attended the sale in pursuance of these instructions and purchased amongst other lands the lot in question ; that the plaintiff's husband acted as auctioneer at the sale, and knocked down the lots to him, and that after the sale the money he paid upon the lots was handed to him by Mrs. Mooney, and that he thereupon assigned the tax sale certificates to her. She stated that the money used in these purchases was made by her out of certain transactions with an estate called the Langton estate, in which she had been in partnership with one Gainor. Gainor was called as a witness and stated that Mr. Mooney had told him that his wife's name was used in the Langton estate transaction because, owing to financial difficulties, he could not make the purchase in his own name. Gainor further stated that the profit upon the transaction was only \$120, which was divided between him and the Mooneys in 1885, the tax sale having taken place in 1883. The learned Judge left to the jury the question of the damages only, and reserved the other questions, apparently with the consent of counsel. The jury assessed the damages at \$94.50.

Statement

On 13th May, 1889, the learned Judge delivered judgment, finding that the money used in the purchase at the tax sale was the money of Frederick Mooney, and that the purchase was made with the money and for the benefit of Frederick Mooney, who was then the treasurer of the county, and he dismissed the action with costs, but declared the plaintiff entitled to a lien upon the lands in question for the taxes paid and interest.

On 4th June, 1889, *G. T. Blackstock*, for the plaintiff, moved before the Divisional Court (FALCONBRIDGE and STREET, JJ.), for an order setting aside this judgment and ordering that judgment be entered for the plaintiff for the damages found by the jury upon the grounds: (1) that the judgment for the defendant was contrary to law and evidence and the answers of the jury to the questions submitted to them; (2) that the lands in question having been conveyed to the plaintiff by deed for arrears of taxes, and the defendant not having questioned the deed within the time limited by statute, he could not now, four years after the making and registration of the tax deed, dispute its validity, and that the said lands were now the absolute property of the plaintiff.

Masten and H. B. Dean, contra.

The authorities cited by counsel are referred to in the judgment.

June 22, 1889. The judgment of the Court was delivered by

STREET, J. :—

The facts disclosed in the evidence leave room for no other conclusion than that at which our brother MACMAHON arrived in his finding that the purchase at the tax sale, although made nominally by Reuben C. Garrett for the plaintiff, was in reality made with the money and for the

benefit of her husband, Frederick Mooney, the treasurer of the county, who conducted the sale and whose position absolutely debarred him from becoming a purchaser at it. In the words of Lord Ellenborough in a similar case: "I should have inclined very strongly from the argument I have heard to have held, that if the sheriff, or his officers acting for him, depart so entirely and scandalously from their duty in making a mock sale of the goods in the manner which has been represented to us, it could not be considered as a sale in obedience to the writ of fieri facias, but rather a conspiracy to despoil the plaintiff of his property:" *Phillips v. Bacon*, 9 East at p. 303. See also *Massingberd v. Montague*, 9 Gr. 92; *Re Cameron*, 14 Gr. 612; *Beckett v. Johnston*, 32 C. P. 301; *Chandler v. Moulton*, 33 Vermont 245. Judgment.
STREET, J.

The real plaintiff in this action, upon the findings of the Judge, is therefore the husband of the nominal plaintiff, and the title acquired under the tax sale is to be treated as if the sale had been made by him to himself, excepting that the fact of an attempt having been made to conceal the real transaction shews more clearly that its impropriety was known.

The plaintiff, however, contends that under sec. 189 of ch. 193, R. S. O., the title has become valid notwithstanding its original defects. That section provides that: "Whenever lands are sold for arrears of taxes, and the treasurer has given a deed for the same, such deed shall be to all intents and purposes valid and binding, except as against the Crown, if the same has not been questioned before some Court of competent jurisdiction by some person interested in the land so sold within two years from the time of sale."

The sale here took place in 1883, and this action was not begun until 1889. We are relieved from the necessity of considering what would be the effect of this section had the land become vested in the hands of an innocent purchaser; that question was incidentally raised but was not actually decided in *Beckett v. Johnston*, 32 C. P. 301.

Judgment.

STREET, J.

Here the lands remain in the hands of the persons guilty of the original fraud, and it is plain that they cannot be allowed to set up the provisions of sec. 189 as an answer to the claim of the person who has been despoiled: *Rolfe v. Gregory*, 4 DeG. J. & S. 576; *Blair v. Bromley*, 5 Ha. 542; *Allfrey v. Allfrey*, 1 Macn. & G. 87; *Chandler v. Moulton*, 33 Vermont 245.

The defendant asks for a declaration that the tax sale and the conveyance under it are void. We think he is entitled to such a declaration if he desires it. The plaintiff is, however, entitled to a lien for the taxes she has paid on the land with interest; the amount may be ascertained by the registrar if the parties differ about it, and should be mentioned in the judgment and set off against the defendant's costs. In all other respects the judgment moved against should be affirmed, and the defendant should have the costs of the motion in addition to the costs of the action.

[QUEEN'S BENCH DIVISION.]

REGINA V. BARNETT.

Criminal law—Larceny Act, R. S. C. ch. 164, sec. 65—Fraudulent conversion of negotiable securities by trustee—Letter shewing trust—Identity of instruments produced with those mentioned in letter—Conversion of proceeds of securities—Property, definition of—Sanction of Attorney-General—Proof of.

The defendant was indicted and convicted under the Larceny Act, R. S. C. ch. 164, sec. 65, for that he, being a trustee of two negotiable securities for the payment of \$5,250 each, the property of the C. bank, for the use and benefit of the C. bank, unlawfully and with intent to defraud, did convert and appropriate the two negotiable securities to the use and benefit of him, the defendant, etc.

At the trial the following letter, written and signed by the defendant, dated 6th November, 1885, was produced: "I have this day been entrusted by A. (the cashier of the C. bank) with two notes of \$5,250 each, for the specific purpose of paying two notes for \$5,000 that are due in Montreal on 8th November, 1885, and my failing this shall consider myself committing criminal offence and amenable to the criminal law."

The securities produced at the trial as those converted by the defendant were two drafts, not promissory notes, for \$5,250 each, dated 7th November, 1885; and two drafts for \$5,000 each were also produced answering the description of the notes for that amount mentioned in the letter, except that they were not actually notes, and were due at Toronto on the 9th November instead of at Montreal on the 8th. It was shewn, however, that they were held by a person in Montreal.

It also appeared in evidence that the defendant procured one B. to discount the two drafts for \$5,250 each, B. retaining \$1,000 for an old debt, and paying part of the balance of the proceeds to the defendant in diamonds. The defendant did not take up the two \$5,000 drafts and retained the proceeds of the two new drafts.

The drafts were identified by witnesses as to dates, amounts, etc., and entries in the defendant's memorandum book, also produced, shewed the nature of the transactions with the cashier and B.

The trial Judge stated a case for the opinion of the Court.

Held, upon the evidence, that the drafts were the property of the bank and not of the cashier in his private capacity; and, upon the law and evidence, that the defendant was a trustee of the documents within the meaning of the statute; and that, notwithstanding the discrepancies as to the nature of the instruments, the due date, and place of payment, there was sufficient evidence to go to the jury of the identity of the drafts produced at the trial with the notes mentioned in the letter.

It was contended that the defendant should have been indicted for converting the *proceeds* of the securities, inasmuch as the securities were entrusted to the defendant for a purpose which rendered necessary the conversion of the securities themselves.

Held, that the nature of the transaction with B. shewed an appropriation by the defendant of the securities themselves to his own use; and

Per FALCONBRIDGE, J.—Even if it had been otherwise, the definition of property in sub-sec. (e.) of sec. 2 of R. S. C. ch. 164 shewed the sufficiency of the indictment.

It was objected that no proof was given at the trial that the sanction of the Attorney-General, required by R. S. C. ch. 164, sec. 65, sub-sec. 2, had been given.

Held, that this objection was not open to the Court upon a case reserved, not being a question that could properly arise at the trial. *Knowlton v. The Queen*, 5 B. & S. 532, followed.

Statement.

SPECIAL CASE reserved for the opinion of the Justices of the Queen's Bench Division by ROSE, J., at the Spring Sittings, 1889, of Oyer and Terminer for the county of York.

The following was the case stated by the learned Judge :

The defendant was tried and convicted before me at the Sittings of Oyer and Terminer for the county of York, on the 19th day of April, A.D. 1889, on an indictment under the Larceny Act (Revised Statutes of Canada, chapter 164) section 65, which indictment is in the words following :

"County of York, to wit :—

"The jurors for our Lady the Queen upon their oath present that Roland Gideon Israel Barnett on the sixth day of November in the year of our Lord one thousand eight hundred and eighty-five, at the city of Toronto, in the county of York, then being a trustee of two negotiable securities for the payment of money, to wit, for the payment of the sum of five thousand two hundred and fifty dollars each, the property of the Central Bank of Canada (a duly incorporated body), for the use and benefit of the said the Central Bank of Canada, unlawfully and with intent to defraud, did convert and appropriate the said two negotiable securities to the use and benefit of him, the said Roland Gideon Israel Barnett, against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her Crown and dignity."

The shorthand notes of the evidence of the Crown, including the exhibits filed, are to form part and to be considered as embodied in this reserved case.

At the close of the case for the Crown, counsel on behalf of the defendant submitted that there was no evidence to go to the jury. I held that there was sufficient evidence to go to the jury.

The jury found the prisoner guilty of the offence charged in the indictment, and the prisoner was remanded on the indictment.

At the request of counsel for the prisoner I reserved the case, and submit for the opinion of the Honorable the Jus-

tices of the Queen's Bench Division of the High Court of ^{Statement.} Justice, in pursuance of the statute in that behalf, the question :

Was there evidence to be submitted to the jury of an offence within the 65th section of the Larceny Act, chapter 164, R. S. C., as charged in the indictment ?

The case was argued before FALCONBRIDGE and STREET, JJ., on the 5th June, 1889.

J. J. Maclaren and *G. T. Blackstock*, for the prisoner.
Irving, Q.C., and *Osler*, Q.C., for the Crown.

The facts and arguments and authorities cited by counsel appear in the judgments.

June 22, 1889. FALCONBRIDGE, J. :—

In *Regina v. Gibson*, 16 O. R. 704, we objected to the whole of the evidence, (instead of merely the material facts established by the evidence) being made part of the case. Lest the present case should be cited as a precedent for infringing the rule which we there laid down, I have to say that I do not see how, under the peculiar circumstances of this case, my brother Rose could have reserved it in any other way.

Before dealing with the merits of the case reserved, I shall dispose of a point taken by counsel for defendant, which is in its nature quasi-technical.

Sub-sec. 2 of sec. 65, under which the defendant is indicted, provides that no proceeding or prosecution for any offence mentioned in this section shall be commenced without the sanction of the Attorney-General or Solicitor-General for the Province in which the same is to be instituted.

No proof of such sanction was given at the trial.

I am inclined to think that this point was not reserved, and was not capable of being reserved ; and, further, that

Judgment. where the defendant relies on the absence of preliminary proceedings, he may, and probably must, adopt other modes of bringing the matter to the knowledge of the Court : *Regina v. Heane*, 4 B. & S. 947 ; 9 Cox C. C. 433 ; *Regina v. Fuidge*, *ib.* 430 ; *Regina v. Bradlough*, 15 Cox C. C. 156 ; *Regina v. Yates*, *ib.* 272, 276 ; *Knowlden v. The Queen*, 5 B. & S. 532.

Falconbridge,
J.

But whether this matter is properly before us or not, the case last cited is decisive of the point. It was there held that it was not necessary that the indictment should aver that the conditions imposed by Imp. Statute 22 & 23 Vic. ch. 17, sec. 1, had been performed, *i. e.*, that it had been preferred by the direction or with the consent of a Judge or of the Attorney-General or Solicitor-General.

Blackburn, J., at p. 542, *arguendo*, says there is a practical inconvenience in producing the direction or consent of the Judge or the Attorney-General at the trial, as it would prejudice the case against the defendant ; and Cockburn, C. J., says at p. 549 : " It would be very inconvenient that proof of the proper recognizances having been entered into, and of the consent of a Judge or of the Attorney-General or Solicitor-General having been obtained, should be given before the petty jury ; and if they were stated on the record they might be traversed and must be proved. That cannot have been the intention of the Legislature." See also per Crompton, J., at p. 552.

On or about the 6th November, 1885, the defendant received from A. A. Allen, cashier of the Central Bank, the following acceptances :

EXHIBIT 4.

\$5,250.

Due 20th Dec.

TORONTO, November 7th, 1885.

Forty days after date pay to the order of myself at the Central Bank of Canada, Toronto, Ontario, five thousand two hundred and fifty dollars, and charge to account of

(Signed)

ROLAND G. I. BARNETT.

To A. A. Allen, Esq., Cashier Central Bank of Canada, Toronto, Ont.	Judgment.
Accepted for the Central Bank of Canada.	
(Signed)	A. A. ALLEN, Cashier.
Endorsed.	(Signed) ROLAND G. I. BARNETT.
	Falconbridge, J.

EXHIBIT 5.

\$5,250.

Due

TORONTO, November 7th, 1885.

Forty days after date pay to the order of myself at the Central Bank of Canada, Toronto, Ontario; five thousand two hundred and fifty dollars, and charge to account of

(Signed) ROLAND G. I. BARNETT.

To A. A. Allen, Cashier Bank of Canada, Toronto, Ont.

Accepted for the Central Bank of Canada.

(Signed) A. A. ALLEN, Cashier.

Endorsed. (Signed) ROLAND G. I. BARNETT.

Giving the following acknowledgment :

EXHIBIT 1.

To A. A. ALLEN, Esq.,

Cashier Central Bank of Canada.

I have this day been entrusted by A. A. Allen with two notes of five thousand two hundred and fifty dollars each, for the specific purpose of paying two notes for five thousand dollars that are due in Montreal on 8th November, 1885, and my failing this shall consider myself committing criminal offence and amenable to the criminal law.

(Signed) ROLAND G. I. BARNETT.

Toronto, Ont., November 6th, 1885.

And receiving from Allen the following letter:

EXHIBIT 10.

TORONTO, 6th November, 1885.

R. G. I. BARNETT, Esq., Toronto.

Dear Sir—To assist you in meeting certain obligations maturing, I have accepted your two drafts for five thousand two hundred and fifty dollars each, drawn at forty days after date from 7th instant, against securities in my hands.

Yours truly,

(Signed) A. A. ALLEN,
Cashier, for Central Bank of Canada.

The case for the Crown was that the trust was created by Exhibit 1, and that the defendant, being a trustee of the two negotiable securities Exhibits 4 and 5, the property of the Central Bank of Canada, for the use and benefit of the said bank, with intent to defraud, did convert

Judgment. and appropriate the said two negotiable securities to the use and benefit of him the said Barnett, against the form, &c.
Falconbridge, J.

The Crown undertook to prove that the defendant was a trustee of Exhibits 4 and 5 for the purpose of paying the two following drafts or acceptances:

EXHIBIT 2.

\$5,000.

Due 9th November, No. 1640.

TORONTO, Aug. 8th, 1885.

Ninety days after date pay to the order of myself five thousand dollars, and charge to account of

(Signed) ROLAND G. I. BARNETT.

To A. A. ALLEN, Esq.,

Cashier Central Bank of Canada, Toronto.

Accepted, payable at the Central Bank of Canada, Toronto.

(Signed) A. A. ALLEN, Cashier.

Endorsed.

(Signed) ROLAND G. I. BARNETT.

Pay to the order of the Bank of Montreal for the Bank of Montreal Branch.

(Signed) E. P. WINSLOW,
Pro Manager.

EXHIBIT 3.

\$5,000.

Due 9th November.

TORONTO, Aug. 8th, 1885.

Ninety days after date pay to the order of myself five thousand dollars and charge to account of

(Signed) ROLAND G. I. BARNETT.

To A. A. ALLEN, Esq.,

Cashier Central Bank of Canada, Toronto.

Accepted, payable at the Central Bank of Canada, Toronto.

(Signed) A. A. ALLEN, Cashier.

Endorsed—Pay Merchants Bank of Canada or order.

(Signed) ROLAND G. I. BARNETT.

And in order to make out a case it is necessary for the Crown to identify Exhibits 2 and 3 as the two notes of \$5,000 each, and Exhibits 4 and 5 as the two notes of \$5,250 each mentioned in Exhibit 1.

This is, in my opinion, the only point in the case. For there is, I think, abundant evidence that Barnett was a trustee both in law and fact: *Harris v. Truman*, 7 Q. B. D. 340; 9 Q. B. D. 264; *Gray v. Gray*, 21 L. J. Ch. 745; *Regina v. Fletcher*, 9 Cox C. C. 189; *Regina v. Christian*, 12 Cox C. C. 502; and that the securities were the property of the Central Bank.

There was some vague evidence of a settlement having been arrived at between the bank and defendant, after the date of these transactions, but that fact, even if proved to be a fact, could not affect this proceeding, though only a misdemeanour is charged. Judgment.
Falconbridge,
J.

It is also argued that if the trust was that defendant should discount the notes or securities referred to in Exhibit 1, and with the proceeds thereof retire or take up Exhibits 2 and 3, then defendant could not be convicted under this indictment, but should have been indicted for converting the proceeds of the securities, inasmuch as in discounting those securities he was so far only carrying out the very purpose, and observing the very trust declared in Exhibit 1. There are two sufficient answers to this contention: (1) that by sub-sec. (e), of sec. 2, of ch. 164, "property" is defined to be "not only such property as was originally in the possession or under the control of any person, but also any property into or for which the same has been converted or exchanged, and anything acquired by such conversion or exchange, whether immediately or otherwise:" *Regina v. Townshend*, 15 Cox C. C. 466; *Regina v. DeBanks*, *ib.* 450. And (2) the defendant did not discount the securities, and receive the whole proceeds, and then go on to apply or misapply them, but it appears from the memorandum book of defendant, and from the evidence of one Baxter, who cashed the securities, that \$1,000, part of the proceeds thereof, was retained by Baxter for "old promise and ring," *i. e.*, for some prior debt to Baxter; so that in and by the act of conversion the defendant placed it out of his power to carry out from those funds the purpose and trust indicated by the instrument creating the trust.

I have not overlooked, but I am not impressed by, the argument that Exhibit 10 gives the true account of the transaction, and truly defines the situation and the rights of the parties. The use of Exhibit 10 was that it should be produced and shewn to the person cashing or discounting the drafts. There were no securities in Allen's hands.

Judgment. The mysterious entry in the pass-book of "£5,500 sterling bill, Davis, utilized to cover account to extent of \$25,640.40," bears date 14th June, 1886, seven months after these transactions, and the pass-book (which was filed by defendant), commences with a debit entry dated October 1, 1885, of \$14,906.09.

Falconbridge,
J.

I return to what I have already stated to be, in my judgment, the sole point to be decided, viz: whether the Crown presented evidence proper and sufficient to be submitted to a jury, of the identity of Exhibits 2, 3, 4, and 5, with the "notes" mentioned in Exhibit 1. There is little evidence *dehors* the documents themselves, and the theory of the defence is that Exhibit 1 does not properly describe and does not refer to them.

As to Exhibits 4 and 5, there is no room for argument. The only alleged discrepancies are (a) that Exhibit 1 is dated 6th November, and the drafts are dated 7th November; (b) that the drafts are described as notes:

(a) The "notes" are not described in Exhibit 1 as being dated on 6th November; (b) Exhibit 1 is wholly in defendant's handwriting. Although a man apparently conversant with affairs, he is not said to be either a lawyer or a banker, and he might well describe a draft as a note or *vice versa*.

As to Exhibits 2 and 3. (1) The observation which I have just made is equally applicable. (2) The "notes" are said in Exhibit 1 to be "due in Montreal." Exhibits 2 and 3 are accepted payable at the Central Bank of Canada, Toronto. But there is evidence that they were held in Montreal, or by persons residing in Montreal. (3) They are said to be due on the 8th November, whereas in truth they fell due on the 9th.

The identification of the drafts by the witnesses went the common and usual length of stating that they had dealt with drafts corresponding to those in date, amount, etc.

All these matters were fair subjects of comment, and were no doubt fairly presented to the jury by defendant's

counsel, but I cannot see how my brother Rose could have withdrawn the case from the jury. The entries in defendant's memorandum book form a link in the chain of evidence against him. Judgment.
Falconbridge,
J.

My opinion on the case reserved is that there was evidence to be submitted to the jury of an offence within R. S. C. ch. 164, sec. 65, as charged in the indictment.

STREET, J. :—

I agree in the conclusions arrived at by my brother Falconbridge upon the various questions raised in this case.

It was objected by counsel for the prisoner that no proof was given at the trial that the sanction of the Attorney-General, required by sub-sec. 2 of sec. 65 of ch. 164, R. S. C., before a prosecution under that section can be commenced, had been given.

I think we are bound by clear authority to hold that this question was not open to us upon this argument; *Knowlden v. The Queen*, 5 B. & S. 532, shews this to be a question which cannot arise upon the trial, because it would be improper to allege it in the indictment or to give proof of it before a petit jury; and in the late case of *Regina v. Gibson*, 16 O. R. 704, we held that under the 259th sec. of ch. 174, R. S. C., we could not upon a case reserved entertain any question but one strictly arising on the trial.

There was evidence to go to the jury in the form of the Exhibits 4 and 5, and of Exhibits 1 and 10, and from the entries in his own note-book, that the defendant was a trustee within the meaning of the Act of these documents Exhibits 4 and 5 for the Central Bank, and that he received them from Allen in his capacity of cashier of the bank and not in his private capacity.

The note-book shews that the defendant was in Toronto on 6th November, 1885; the entry is, "started from Montreal to Toronto, 5th; saw A.; returned to Montreal 6th November, 1885." The inference that he left Toronto on

Judgment. the evening of the 6th is supported by a further entry of
STREET, J. payment of sleeping car fare on that day. So that there is evidence to go to the jury from these circumstances, that he was in Montreal on the 7th November, and that the two drafts signed by him for \$5,250 each, dated Toronto, 7th November, 1885, were drawn in Toronto on the 6th November, if they were drawn in Toronto at all. He enters in his note-book under date of 7th November, "Notes drawn at 40 days from this date for \$10,500, payable at Central, Toronto." He enters no other transaction at the same time in his note-book which can possibly refer to the instruments mentioned in his receipt given Allen. Then follows his memorandum of the transaction with Baxter, which Baxter's evidence shews to have been a purchase of two drafts for \$5,250 each, answering the description of but not absolutely identified as the two Exhibits 4 and 5. This memorandum together with Baxter's evidence shews that the defendant converted the drafts in a manner inconsistent with an intention to take up the notes which he had agreed to retire with the proceeds of the two \$5,250 drafts. He sold them to Baxter and allowed Baxter to keep out of the proceeds a debt for \$1,000 or thereabouts, which he owed Baxter; and he took \$4,100 of the amount in diamonds. I think the jury might well find in this transaction evidence of an appropriation by defendant to his own use of the two drafts, and that we are not driven to consider whether under the 65th section a conversion of the original trust property is proved by shewing a conversion of that for which it has been exchanged.

It was shewn on the part of the Crown that two drafts made by the defendant dated 8th August, 1885, for \$5,000, each payable ninety days after date, and drawn on Allen as cashier of the Central Bank, and accepted by him payable at that bank in Toronto, were afterwards taken up by the Central Bank and charged to the account of the defendant. There was no evidence of the existence of any instruments answering exactly the description of those mentioned in

Exhibit 1, but there was evidence by which the two \$5000 drafts might be identified as the instruments intended by the description in that exhibit. The defendant drew that Exhibit 1 himself, and the jury might infer that he did not appreciate the distinction between a note and a draft, if they found, as they probably did, that the entry in his note book of 7th November, 1885, above quoted referred to the two drafts for \$5,250 each, because he speaks of them as "notes."

Judgment.
STREET, J.

The bank marks on the face of the two \$5,000 drafts shew them to have passed through banks in Montreal, and Baxter's evidence shews that he lived in Montreal, and had there purchased from Barnett two drafts for \$5,000 each, answering the description of Exhibits 2 and 3, and had resold them to a Mr. Campbell of Montreal, who held them when they came due, and collected them through the bank when they came due. This might explain the description that they were due in Montreal, and agreeing so nearly in other respects it would not be unreasonable to infer that they may have been described as due one day sooner than they were actually due, either by mistake or because it was intended that they should be taken up in Montreal before their actual maturity.

Allen had left the country, but the accountant of the Central Bank was called, and stated that he knew of no other obligations than Exhibits 2 and 3, to which Exhibit 1 could refer. All these circumstances I think were properly submitted to the jury, and they have chosen to treat the two \$5,000 drafts produced as those intended by Exhibit 1.

I think the conviction should be affirmed.

[COMMON PLEAS DIVISION.]

GRIFFIN ET AL. V. KINGSTON AND PEMBROKE RAILWAY
COMPANY.

Copyright—Neglect of author to deposit copy, etc.—Right to proceed for infringement—Railway ticket—Subject of copyright.

Sec. 5 of the Con. Stat. C. ch. 81, is merely directory, and so the neglect of the author of a work to deposit a copy thereof in the library of Parliament does not incapacitate him from proceeding for an infringement of it.

A railway ticket is not a subject of copyright under said Act.

Statement.

THIS was an action tried before FALCONBRIDGE, J., without a jury, at Kingston, at the Spring Assizes of 1889.

Bain, Q.C., for the plaintiff.

Cattanach and *R. Vashon Rogers*, for the defendants.

The plaintiff sued as assignee of an alleged copyright in a railway ticket, stating an infringement by the defendants in printing and using many copies thereof. He claimed damages, and an injunction, and an account of profits.

The defendants by their pleading traversed the material allegations in the statement of claim and averred :

Par. 4. The tickets now in use by the defendants, and which have been printed and used by them since 27th April, 1885, are not copies of the "New Plan of Railway Tickets" mentioned in the plaintiff's statement of claim, but are modifications and adaptations of tickets that have been in common use by railway companies and others in the Dominion of Canada and the United States of America for many years past without the interference of the plaintiff or of James K. Griffin (his assignor) ; and in so using and printing the said tickets, so used by defendants, the defendants have acted with the consent and approval of the railway companies and others who first used the

said tickets; and the tickets, so used and printed by defendants, are not like nor similar to the alleged ticket of the plaintiff. Statement.

Par. 5. The alleged ticket of the plaintiff is not now and never has been in use anywhere in the Dominion of Canada, nor is there upon every copy of such tickets the notice giving information of the copyright being secured required by the Copyright Act.

Par. 6. The alleged ticket of the plaintiff is not a proper subject of copyright.

Par. 7. If the defendants have infringed, which they deny, they have done so in ignorance and without any fraudulent or improper intent.

Issue thereon.

The material part of the evidence was as follows:

James K. Griffin. "I invented this ticket." Exhibit 1. "I am the author of it." Puts in certificate of Deposit dated 7th December, 1863, under Con. Stat. C. ch. 81. sec. 4. "I was then resident in this Province. It was adopted by the Great Western Railway, and they took a lease and purchased the right to use it. The Intercolonial acquired it also. Exhibit 2 is defendants' ticket (admittedly in use by them since March, 1886). It contains days, months, years, etc., the same as mine, but names of stations instead of symbols. The intention is just the same. Exhibit 3, is an assignment by me to the plaintiff, dated 22nd September, 1885, recorded in the Department of Agriculture, on the 19th of October, 1885. My ticket is not primarily a duplex. This is the first ticket providing for the record of its use, so that it could not be re-issued."

Cross-examined. "I had a lot printed to show the authorities what they were. I don't think the Great Western Railway ticket was exactly like this. They adapted the idea to suit themselves. The registration of this was the only legal step I took to secure the copyright. The punch was in use before my invention—no variety in this, nor in showing point to point. Mine shews intermediate stations and date of punching. I had an arrangement with the

Statement. Welland Railway. Exhibit 4 is their ticket. I don't know that they ever used it. Exhibit 5 is the Intercolonial ticket for 1886, 1887."

George D. Griffin, the plaintiff. I have an arrangement with the Intercolonial. I furnish them with the tickets. They all (since the assignment to me) have the notice printed on them required by sec. 6 of the Con. Stat. I had an arrangement with the Welland Railway up to the time of its absorption by the Grand Trunk Railway. Their tickets had the notice before the assignment to me. Exhibit 7 is a copy of the notice to the defendants in 1880 sent by registered letter."

Cross-examined. "Exhibit 8.—Red ticket without notice for 1883-'4-'5—was probably printed in 1883. From the time I got assignment I gave explicit orders to have it put on. There was a plate before I got the assignment. I have never seen one since the assignment without the notice. Exhibit 9.—Blue ticket 1887 for 1887-'8-'9. The notice was on this before 1886—have seen it. It was put on immediately I got the assignment. It may not have been on all of them before that. The Welland Railway tickets were printed first in 1880. Exhibit 10 is not one of my tickets, and, as far as dating on back is concerned, is an infringement."

Re-examined. "My brother (J.K. Griffin) knew of the arrangement with the Welland Railway. The profit is divided between him and me. He knew nothing of what was furnished to the Intercolonial—that was without his authority."

Exhibit 13 (put in after the trial). It was an agreement, dated 20th October, 1880, between J. K. Griffin and the plaintiff, whereby the plaintiff was to get one-half of all moneys realized from sales of rights under copyright and his expenses.

Exhibit 11 was a power of attorney, dated 20th October, 1880, from J. K. Griffin to the plaintiff: To sell, dispose of, and assign rights, collect penalties, execute documents, etc.

"The Intercolonial Railway had been using tickets of this kind before I made agreement with them in November or December 1883."

J. K. Griffin, recalled. I was first made aware at this Statement.
trial of the agreement with the Intercolonial Railway.

For the defence, *Francis Conway*, Assistant General Freight and Passenger Agent of defendants was called. He said : The plaintiff's ticket is not a duplex ticket. Everyone cannot understand his ticket—ours they can. I prepared this ticket. I had never seen nor heard of the plaintiff's ticket or copyright. Ours is not issued at stations, but by the conductor from a book. Exhibit 12 is our station ticket, either stamped or date written with pen, and punched when presented to conductor.

The learned Judge reserved his decision and afterwards delivered the following judgment :

February 27, 1889. FALCONBRIDGE, J. :—

The first objection to the plaintiff's recovery is that there is no evidence that the author deposited a copy of the work in the Library of Parliament under sec. 5 of the Consol. Stat. C. ch. 81.

I shall dispose of this by observing that it is not pleaded. The section is merely directory, and the neglect of this duty does not incapacitate the proprietor of a copyright from proceeding for an infringement of it as failure to give information does by virtue of sec. 6.

It is next urged that the ticket is not the subject of copyright at all.

The words of the Con. Stat. C. ch. 81, sec. 1 are: "Any person . . . who is the author of any book, map, chart, or musical composition, already made or composed but not printed or published, or hereafter made or composed or who invents, designs, etches, engraves or causes to be engraved, etched or made from his own design, any print or engraving, . . . shall have the sole right, etc."

Is the ticket fairly described by any of these words?

If I had to decide the case with reference to the present statutes there would not, I apprehend, be any doubt on the subject.

Judgment. The corresponding section in the Copyright Act, R. S.
 Falcon bridge, C. ch. 62, sec. 4 is as follows:
 J.

"Any person . . . who is the author of any book, map, chart or musical composition, or of any original painting, drawing, statue, sculpture or photograph, or who invents, designs, etches, engraves or causes to be engraved, etched or made from his own design, any print or engraving . . . shall have the sole and exclusive right . . . of printing . . . *such literary, scientific or artistic works or compositions, etc.*"

The italicised words surround what precedes them with a limitation which would, I think, not include an article like the plaintiff's ticket.

But having regard to the statute with which I have to deal:

The ticket is certainly not a map, chart or musical composition, nor is it a print or engraving, within the meaning of the section, although it may be printed or engraved.

Is it a book?

Sec. 16 of the article defines "Book," but only with reference to sec. 15.

I attach no importance to the mere shape or form of the card or ticket. Book and *liber* were primarily, and primarily meant, the bark of a tree. So a book need not necessarily be a book in the common acceptance of the term, viz., a volume made up of several sheets bound together. It may be printed on only one sheet: *Clayton v. Stone*, 2 Paine 382; *Scoville v. Toland*, 6 Western L. J. 84; *Drury v. Ewing*, 1 Bond 540.

The first Copyright Act in England is 8 Anne ch. 19. In the preamble it is stated that printers, booksellers, and other persons were frequently in the habit of printing, reprinting, and publishing "books and other writings without the consent of the authors or proprietors of such books and writings to their very great detriment, and too often to the ruin of them and their families."

"For preventing, therefore, such practices for the future and for the encouragement of *learned men to compose and write useful books*, it is enacted, &c."

In *Routledge v. Low*, L. R. 3 H. L. 100 Lord Cairns ^{Judgment.} said, at p. 111: "The aim of the legislature is to increase ^{Falconbridge,} the common stock of the literature of the country." J.

In *Page v. Wisden*, 20 L. T. N. S., 435, Malins, V. C., says with reference to a cricketing scoring-sheet, at p. 436: "On the question whether this is a fit subject for copyright I have no doubt whatever that it is not."

In *Davis v. Committi*, 54 L. J. N. S. Ch. 419, the card or dial on the face of a barometer displaying special letter-press was held not capable of registration under the Copyright Act of 1842. That Act (5 & 6 Vic. ch. 45) in sec. 2 gives the same definition of "Book" as is given in sec. 16 of our Consol. Stat.

A label intended for no other use than to be posted on vials or bottles containing a medicinal preparation, is not the proper subject of a copyright: *Scoville v. Toland*, 6 Western L. J. 84. An advertising card used to display the different colors of paints is not a subject of copyright; *Ehret v. Pierce*, 18 Blatch. 302. Blank account books are not the subject of a copyright: *Baker v. Selden*, 101 U. S. 99.

These American decisions are under the U. S. Revised Stat. sec. 4952 which is somewhat wider than our section: "Any citizen . . . who shall be the author, *inventor, designer or proprietor, &c.*"

Our statute speaks only of the author.

The (American) statute was passed for the encouragement of learning, and was not intended for the encouragement of mere industry unconnected with learning or science: *Clayton v. Stone*, 2 Paine 382.

Thus we see that the object and principle underlying the legislation and the judicial interpretation of the legislation from Queen Anne's time to the present is to protect, advance, and encourage learning and art; and not, unless it be casually and indirectly, to promote or assist progress in mechanical or industrial appliances or inventions, as to which the law makes beneficial provision otherwise.

Judgment. What is the literary property to be protected in this ticket? Surely not the card itself which, without the application of the conductor's punch, is "senseless and unmeaning." Then, to adapt the illustration of Chitty J. in *Davis v. Committi*, would a deposit of the card or ticket in the library of Parliament be a compliance with sec. 5? The necessity of delivering the punch as part of the work effects a *reductio ad absurdum* of the plaintiff's argument.

I am therefore of the opinion that this card or ticket is not a proper subject of copyright.

If the Imperial Act 5 & 6 Vic. ch. 45 is in force in this country, as contended by the plaintiff, it will not advance the plaintiff's position in this regard.

The plaintiff also claimed in argument a Common Law right of copy and property irrespective of the statute. I do not discuss this interesting and much-vexed question because I do not think the card or ticket to be such an intellectual production as could have claimed for its author or inventor any protection at Common Law.

Taking this view of the matter in controversy I deem it unnecessary to go into the other objections which are said to stand in the way of the plaintiff's recovery.

The action will be dismissed with costs.

[COMMON PLEAS DIVISION.]

THE ST. CATHARINES RAILWAY COMPANY V. NORRIS.

Railway—Loss of local custom by use of railway—Compensation—Speculative damages.

Where, under the Railway Act, 51 Vic. ch. 29 (D.), the owner of a mill who was also the owner of a lot adjoining it, which was used as the principal means of communication between the mill and a public highway, and across which lot a railway company had erected a trestle bridge, also sought compensation for the loss of local custom to and from the mill, not arising from the construction of the railway, but from a subsequent user of it.

Held, that the damages were too remote and speculative to be allowed.

THIS was an appeal by the company from an award *Statement.* under the Dominion Railway Act as to the compensation to be paid by them for a right of way or easement across the land of the respondent, and for damages. The award set forth the ground on which the arbitrators proceeded; (after stating the particulars of the claim:) "The quantity of land lot 66 occupied by the company's trestle work, not including the roadways under it, is worth \$250, and no use can be made of it apart from the purposes of the railway. To all the foregoing the three arbitrators agreed, and we arrived at the unanimous conclusion that the property of Mr. Norris, as far as the causes above mentioned were concerned, was injuriously affected by the railway to the extent of \$445, that is to say:

In respect of the moving of the barrel house.	\$150 00
" " draining	45 00
" " the value of part of lot 66 covered by trestle	250 00
	<hr/>
	\$445 00 "

There was no appeal from this part of the award.

It then proceeded: "The greatest element in the damages claimed as urged by the owner was the alleged loss of farmer's custom at the mill. A great deal of evidence was given for both sides, and two of us, viz, Currie and Baxter arrived at the following conclusion: that for a number of

Statement. years past a considerable quantity of wheat has been annually hauled by farmers from the surrounding country in waggons to the mill door, and there sold: that much mill feed was sold to persons of the same class at the same place: that the wheat so purchased cost the mill proprietor less than if he had had to obtain it at a distance, which he would have been obliged to do had he not obtained it from farmers and taken it to his mill by means of railway or water communication; and the mill feed realized better prices when sold at the mill door to farmers than if he exported or disposed of it in any other way. The passing of trains on the elevated trestle work over lot 66 had the effect of frightening the farm horses to some extent, and whether the apprehension was well or ill-grounded; an impression has been created in the mind of a number of the class we have mentioned that it would be dangerous to go with their horses to Mr. Norris's mill; and the two arbitrators who have executed this award arrived at the conclusion that in the future instead of frequenting the mill for the purpose of selling wheat and purchasing feed as they had been accustomed to do, they would transfer their custom to other mills in the town not in as near proximity to the railway; and that the loss to the proprietor from the withdrawal of such custom would be about \$1005, and that the mill property has from the causes mentioned depreciated in value to that extent. Mr. Montgomery (the third arbitrator) dissented from the view of the other two of us in respect of the loss of farmer's custom. He contended that such loss of custom, even if it occurred, was not such an element of damage or injury to the property as the arbitrators should entertain; but that in fact no such loss had been shewn by evidence, and that in any event there was evidence that the construction of the railway had had the effect of reducing the freight charge of railways generally by which Mr. Norris would be benefited to a considerable extent."

On the 9th day of April, 1889, *Aylesworth* and *Ingersoll*, Argument. supported the motion.

Collier, contra.

April 16, 1889. GALT, C. J.:—

The case was very fully and ably discussed by the learned counsel on both sides. In arriving at the judgment which I have formed I have carefully considered the numerous authorities bearing on this subject, and it is singular to find the great diversity of opinion expressed by the learned Judges.

The only cases to which it is necessary to refer are *Caledonian R. W. Co. v. Walker's Trustees*, 7 App. Cas. 259; *Metropolitan Board of Works v. McCarthy*, L. R. 7 H. L. 243; *Duke of Buccleuch v. Metropolitan Board of Works*, L. R. 5 H. L. 418, as all the cases bearing on this subject are collected and commented on in them.

In the case of the *Duke of Buccleuch v. Metropolitan Board of Works*, which was principally relied on by Mr. Collier, an objection was urged that the House of Lords could not review the findings of the arbitrator or decide on any particular item, the award being one "entire and indivisible sum." This was over-ruled, but it does not arise in the present case as the arbitrators have set out the different items on which their award is based and the reasons on which it is founded.

In the introductory part of the award we find the position of the claimant's property stated as follows :

"The easement in respect of which these proceedings were taken is across a part of lot 66 on the west side of Front street in the town of Thorold, and is for the passage of the railway company's train over high wooden trestles. The whole of that lot 66 is owned by Mr. Norris in fee simple. Adjoining that lot on the west is a parcel of land and a water power on the Welland Canal leased as a mill privilege in the year 1851, by the then commissioner of public works of the Province of Canada to John Brown for

Judgment. a term of twenty-one years, renewable by the lessee in
 GALT, C.J. perpetuity at the end of every twenty-one years for a like
 term. A grist mill was erected and worked on the pre-
 mises, and Mr. Norris, to whom the title has descended by
 successive assignments, has operated it for at least ten
 years up to the present time. We call this property "the
 leasehold property" in order to distinguish it from the lot
 66. The two parcels we have described have long been
 used together as one property for milling purposes, and
 the chief means of communication between the mill and
 the public highway has been over lot 66."

From this description and the plan produced, it appears
 there is a public highway called Front Street. To the east
 of this there is a range of lots, of which lot 66 is one, and
 then crosses a piece of land between this range of lots and
 the Welland Canal. "The leasehold property" is there
 separated from Front street by the range of lots and Mr.
 Norris used lot 66 as a roadway from Front street to his
 mill. The railway runs parallel to the Welland Canal, and
 consequently crosses lot 66. The company have not appro-
 priated any part of lot 66, but have constructed a trestle
 bridge across the lot, leaving a free roadway below the
 bridge affording access to the mill.

It is for this easement and the other matters mentioned
 in the award referring thereto that the sum of \$445 has
 been awarded, and against which no complaint is made.
 It is therefore manifest that no part of what is called "the
 leasehold property," has been affected. The loss complained
 of is for damage sustained by Norris from loss of custom,
 or presumed loss, by reason of farmers being afraid to drive
 to the mill under the trestle bridge; the approach itself
 has not been interfered with, or at any rate, if such a claim
 existed, it has been included in the amount of \$445, as no
 reference is made to it in the award.

The clause of the Railway Act, 51 Vic. ch. 29 (D.),
 under which these proceedings have been taken is sec.
 144, which enacts: * * * "application may
 be made to the owner of lands * * * which

may suffer damage from the taking of materials, or the exercise of any of the powers granted for the railway ; and, thereupon, agreements and contracts may be made with such persons, touching the said lands or the compensation to be paid for the same, or for the damages, or as to the mode in which such compensation shall be ascertained.”

Judgment.
GALT, C.J.

It is plain that so far as “ the leasehold property ” is concerned this section has no application, I mean as to taking any portion thereof or materials from the same ; and Mr. Collier admitted what in truth could not be denied that if Mr. Norris had not been the proprietor of both lot 66 and the “ leasehold property,” he could have made no claim for the damages sought to be recovered ; but his contention was that such being the case he was entitled to damages for injury done to him as such joint owner.

It is manifest that no injury has been done to the mill as a building. It is not in any way affected by the construction of the railway ; what is complained of is that the operation of the railway is calculated not to injure the mill property, but to interfere with the trade of the owner.

This distinguishes the case from both the cases of the *Duke of Buccleuch v. Metropolitan Board of Works*, L. R. 5 H. L. 418, and *Caledonian R. W. Co. v. Walker's Trustees*, 7 App. Cas. 259.

In the former, which was relied on by Mr. Collier, the construction of the Thames embankment separated the garden of Montague House from the river Thames, and in consequence the House of Lords held that the property itself having been diminished in value the proprietor was entitled to recover damages.

In the case of *Caledonian R. W. Co. v. Walker's Trustees*, it was manifest that the property in question had been seriously affected by the closing of access to a principal thoroughfare in Glasgow ; and in the case of *Metropolitan Board of Works v. McCarthy*, it was clear his property had been very much lessened in value.

In the case now before me no such damage was suggested. All that was urged before the arbitrators, or at any rate all

Judgment. on which their award is based, was that there was a speculative loss of local custom not arising from the construction of the railway but from the user of it.

GALT, C.J.

Mr. Aylesworth principally relied on the propositions of law laid down in the case of *Hammersmith R. W. Co. v. Brand*, L. R. 4 H. L. 171, as quoted by the Lord Chancellor in *Caledonian R. W. Co. v. Walker's Trustees*, 7 App. Cas. 259, at p. 276, where damage arises not out of the execution, but only out of the subsequent user of the work, there also is no case for compensation.

I have already stated in that case in which this reference is made, compensation was allowed because the damage complained of was occasioned not by the user but by the actual construction of the work.

Apart from these considerations it appears to me that from the findings of the arbitrators themselves the damages are altogether too remote and speculative. In my opinion the award must be reduced to the sum of \$445.

The appeal is allowed ; but as the amount awarded is so much less than the amount tendered, there will be no costs of this appeal. I have no control over the costs of the arbitration. See section 154.

[COMMON PLEAS DIVISION.]

HENDERSON ET AL. V. THE CORPORATION OF THE
TOWNSHIP OF STISTED.*Assessment and taxes—Exemptions—Sec. 3, 51 Vic. ch. 29 (O.)*

By sec. 3 of the Assessment Amendment Act, 51 Vic. ch. 29 (O.), which came into force on August 1st, 1888, sec 7 of the Assessment Act, R. S. O. ch. 193. was amended by adding to the exemptions : "All horses, etc., owned and held by any owner or tenant of any farm, and when carrying on the general business of farming or grazing." The defendant township was instituted under the Municipal Institutions Act for Algoma, Muskoka, etc., R. S. O. ch. 185, sec. 20 of which provided for the making of an assessment roll, which said roll, by sec. 28, when finally revised, was to be the roll of the municipality until a new roll was made, the council by sec. 29 to fix the time for making the subsequent roll at periods of not less than one nor more than three years, and the year for the purposes of the Act was to commence on 1st January thereof; and by sec. 364 of the Mun. Act, R.S.O. ch. 184, the rates or taxes were to be considered as imposed on and from 1st January, and end with 31st December, unless otherwise provided. By sec. 30 the council might in each year after the final revision of the roll pass a by-law levying a rate on all the real and personal property, etc. The assessment for the year 1888 was made in the months of March and April, and the roll was returned to the clerk of the municipality on or about 1st May, and was finally revised by the council sitting as a Court of Revision on 16th June. On 4th of August a by-law was passed directing a rate to be levied to meet the current expenses for the year. *Held*, under the circumstances, the personal property mentioned was not exempt for the year 1888.

THIS was a special case stated for the opinion of the Court pursuant to Consolidated Rule 554, and was as follows : Statement.

"The defendants are a municipal corporation in the District of Muskoka and Province of Ontario.

The plaintiff is a ratepayer in said municipality.

The assessment for the said municipality for the year 1888, was made in or about the months of March and April, 1888, and the assessment roll was returned to the clerk of the municipality on or about the first day of May 1888.

The said assessment was finally revised by the council of the said municipal corporation sitting as a court of revision on the 16th day of June, 1888, there being no appeals.

By by-law of the said municipal corporation, passed by the council thereof on the 11th day of August 1888, the rate of eight mills on the dollar was directed to be levied and collected to meet the current expenses of the municipality for the year 1888.

Statement. The question for the opinion of the Court is, whether the personal property mentioned in section 3 of the Assessment Amendment Act, 1888, within such municipality was exempt from said rate."

On May 7, 1889, the case was argued.

Urquhart, for the plaintiff.

George Bell, for the defendants.

May 10, 1889. GALT, C.J.—

The 3rd section of the Assessment Act of 1888, 51 Vic. ch. 29, (O.) is as follows:—

"The said section 7 of the Assessment Act is hereby further amended by adding thereto the following as sub-section 14 *a* :

"14 *a*. All horses, cattle, sheep, and swine which are owned and held by any owner or tenant of any farm, and when such owner or tenant is carrying on the general business of farming or grazing." (*a*)

This Act was not to take effect until from and after the first day of August, 1888.

This township is instituted under the provisions of ch. 185 R. S. O.

By sec. 20 assessors are to be appointed whose duty it is to return the roll to the clerk of the municipality. Provision is then made for appeals (in this case there were no appeals).

By sec. 28 "The said roll when finally revised * * shall be taken and held as the roll of the municipality, for all purposes, until a new roll has been made."

By sec. 29, "The council shall, by by-law, fix the time for making the subsequent assessments in the municipality at periods of not less than one nor more than three years : and the year for the purposes of this Act shall be considered as commencing on the first day of January thereof."

(*a*) Section 7 of the Assessment Act, R. S. O. ch. 193, is as follows :
"All property in this province shall be liable to taxation, subject to the following exemptions, that is to say :"

I call attention to this section owing to the opinion I have formed on the case now before me.

Judgment.

GALT, C.J.

By sec. 364 of the Municipal Act. "The taxes or rates imposed or levied for any year shall be considered to have been imposed, and to be due on and from the 1st day of January of the then current year, and end with the 31st December thereof, unless otherwise expressly provided for by the enactment or by-law under which the same are directed to be levied."

By sec. 30 of ch. 185. "The council may, in each year after the final revision of the roll, pass a by-law levying a rate on all the real and personal property on said roll."

This was done by the township in the present case on 11th of August, the Act having come into force on 1st August. Had the by-law been passed on 31st July there could have been no question that the exemption did not apply.

In my opinion the revision of the assessment roll made on 16th day of June was final for the year, and the property in question is not exempt for the present year. To hold otherwise would occasion great public inconvenience. By the express words of the statute the exemption would not take effect until the 1st of August, consequently the property would be liable to assessment up to that date; and moreover, by sec. 364 of the Municipal Act all rates are to be considered to have been imposed and to be due on and from the 1st January of the current year, unless otherwise expressly provided for by the enactment or by-law under which the same are directed to be levied.

There was no such provision in this case.

I give judgment that the property in question is not exempt. I think it expedient to call the attention of the council to sec. 29 in order that they may have a new assessment roll prepared for the present year.

As this is a question in which many of the rate-payers are interested there will be no costs of this action, each party will pay their own costs.

[COMMON PLEAS DIVISION.]

SARNIA AGRICULTURAL IMPLEMENT MANUFACTURING
COMPANY, (LIMITED) v. HUTCHINSON.

Company—Winding-up Act—Necessity for liquidators to sue by order of Court—Objection made too late—Mortgage received as collateral security—Production of, before judgment entered.

Action by plaintiffs to recover the price of an implement manufactured by them. A winding up order had previously been obtained against plaintiffs, and a liquidator appointed. An objection was taken at the trial after the evidence had been given, that the action should have been brought in the name of the liquidator and with the approval of the Court, under sec. 31 of R. S. C. ch. 129. The order authorizing the liquidator to sue either in his own name or in that of the plaintiff was put in after the hearing.

Held, that the objection was too late and must be overruled.

Semble, the proper course is to move in chambers to dismiss the action for want of authority to sue; and *semble* also as the plaintiffs under the statute had power to sue, they could do so without the authority of the Court, if they choose to run the risk of costs.

The plaintiffs had obtained a mortgage from one of defendants as collateral security for the debt, which they had assigned to a bank. The court directed that judgment was to be entered for the plaintiffs only on the production of the mortgage, and a reconveyance or discharge thereof to the mortgagor.

Statement. THIS was an action tried before Proudfoot, J., at the Spring Chancery Sittings 1889, at Guelph.

Moss, Q.C., and Harding, for plaintiff.

Maybee, for defendants other than Forbes.

The facts are set out in the judgment.

June 3, 1889. PROUDFOOT, J.:—

This action is brought to recover the price of an implement manufactured by the company.

The company had a mortgage by way of collateral security on property of one of the defendants. On the 2nd January, 1889, the company assigned this by way of security to the Canadian Bank of Commerce.

On the 24th January, 1889, a winding-up order was made, and one Maclean appointed liquidator.

The defendants object that the action ought not to be in the name of the company, but of the liquidator, and cannot be proceeded with without the approval of the Court, under R. S. C. ch. 129, sec. 31; and also that the collateral security having been assigned, it ought to have been redeemed and in the possession of the plaintiffs before action brought.

Judgment.
PROUDFOOT,
J.

This objection, as to the plaintiffs, is not stated in the statement of defence, and was not relied on at the hearing till the evidence had been taken.

I do not think it tenable at this stage of the case. The defendants might have moved in Chambers to dismiss the action for want of authority to sue; and this, I apprehend, is the usual course where an objection of this kind, in such cases, is made.

Thus, in *Turquand v. Kirby*, L. R. 4 Eq. 123, where the objection was to the liquidator suing in his own name. Lord Romilly says, at p. 127: "The objection has been taken before me several times in Chambers." And then he goes on to say that "The first clause" (of sec. 95 of the Companies Act, 1862, the equivalent of sec. 31 of our Act) "is for getting in property belonging to the company itself before the winding-up order is made. In all such cases he must sue in the name of the company; * * * but where in the course of winding up he endeavours to get from a contributory the amount of his contribution, in those cases the official liquidator may sue also with the sanction of the Court, and the sanction of the Court I have always given to the official liquidator for that purpose."

In that case the objection was taken preliminary to the hearing on the merits.

As in the present case, the action is for the recovery of property belonging to the company (*i. e.*, the debt) before the winding-up order was made, and, as in such cases, it seems the liquidator must sue in the name of the company; and, as the objection, if available, has been made too late, I overrule it.

Judgment.
PROUDFOOT,
J.

In *McDonald v. Carrodi*, 1 Ch. Cham. R. 145, where an action had been brought by a receiver without the leave of the Court, VanKoughnet, C., says, at p. 146 : " The proper and obvious course was to have obtained the sanction of this Court, which, I think would have been given to the contest at law. This not having been obtained, the applicant has to make out a special case to get out of the fund those costs which were incurred at his own risk."

The plaintiffs neglected to produce at the hearing the order authorizing them to sue ; but it has since been left with me, and by it the liquidator is authorized to sue either in his own name or in that of the company.

The company have power to sue under the statute, and if they chose to run the risk of costs, it would seem they may sue without the sanction of the Court.

As to the absence of the collateral mortgage, the judgment will be drawn up only upon its production and reconveyance or discharge to the mortgagor. It is not like the case of a person suing upon a mortgage which he has assigned. Here the plaintiffs sue upon an original cause of action : the mortgage did not merge that, as it was expressly taken as a collateral security only. But the plaintiffs must be ready to give back the mortgage : See *Johnston v. Christie*, 31 C. P. 358 ; *Walker v. Jones*, L. R. 1 P. C. 50.

The judgment will, therefore, be for a declaration of lien for debt and costs, and sale to realize it—plaintiffs entitled to receive money in Richardson's hands with interest, who is to have his costs from plaintiffs, and they can add them to their debt.

There will be a reference to the Local Master.

[COMMON PLEAS DIVISION.]

HAMILTON V. BROATCH.

BRODERICK V. BROATCH.

Evidence—Malicious prosecution—Rule 676—Leave granted to put in original information and judgment of acquittal.

In an action for false arrest and malicious prosecution arising out of a false information laid by defendant, a certified copy of the information having been put in and objected to at the trial, leave was given, under Rule 676, to put in the original afterwards, as also an exemplification of the judgment of acquittal, it appearing that the merits were not with the defendant.

These were actions for false arrest and malicious prosecution tried before ROSE, J., and a jury, at Belleville, at the Spring Assizes of 1889. Statement.

Burdett and S. O'Brien, for the plaintiffs.

W. Kerr, Q.C., for the defendant.

The claim was that the defendant had maliciously laid a false information against the plaintiffs charging that they had broken into the defendant's premises and had stolen his goods, upon which the plaintiffs were arrested, &c.

The plaintiffs put in a certified copy of the information, but it was objected that the original information should have been produced.

It was further objected that no exemplification of the judgment of acquittal had been proven.

Leave was given to supply such evidence as might be necessary to cover these objections.

The jury found that the defendant believed the plaintiffs were the persons who broke into the defendant's premises and had stolen his goods, but that he had no reasonable and probable cause for so believing, and that the defendant was actuated by malice.

The learned Judge reserved his decision on the objections taken, and subsequently delivered the following judgment:

Judgment. April 22nd, 1889. ROSE, J. :—

ROSE, J.

The effect of the findings is, that the defendant did in fact believe that the plaintiffs were the men who broke into his house; but that he had no reasonable and probable cause for so believing, and that he was actuated by malice.

On these findings the plaintiffs are entitled to judgment, unless they have failed to prove their case.

Two objections were taken:

1. That a certified copy of the information was not evidence, but that the original should have been produced.

2. That no exemplification of judgment had been produced.

I gave leave, under Consolidated Rule 676, to supply such evidence as might be necessary to answer these objections and the plaintiffs have supplied the exemplification made up in the defendant's solicitor's office, he being Clerk of the Peace and County Court Clerk.

As to the first objection, the plaintiffs' solicitor at the trial put in a copy certified to be a true copy by the same officer. It is asserted in the written argument put in on the plaintiffs' behalf, in answer to the defendant's argument supplied after the exemplification was furnished, that the certified copy was put in without objection and allowed. I have not noted how this was, and do not remember.

It is further urged on the plaintiffs' behalf, that the original being a public document, a certified copy may be received in evidence under sec. 23, R. S. O. ch. 61, (1887.)

I do not think the plaintiffs' case should be wrecked if their contention should not be upheld, for there is no doubt that the certified copy put before the Court the exact statement of fact, and if for any purpose the original should be referred to, the plaintiffs' ought, in my opinion, at any stage, to be allowed to produce it for the inspection of the Court.

No injustice can possibly be done to the defendant from the acceptance of a certified copy, and if the merits are not with him, technicalities must not be allowed to defeat justice.

There must be judgment for the plaintiff in each case for \$100. I say nothing as to costs. See Con. Rules 1170, *et seq.*

COMMON PLEAS DIVISION.

JONES V. GRACE, RODGERS, AND NORRIE.

*Justice of the peace—Backing warrant of commitment—Adjoining county—
 Illegality—Joint trespass—Damages—Constable executing, liability of—
 24 Geo. II. ch. 24—Notice of action—Interpretation Act.*

The plaintiff, who resided in the county of H., was convicted before defendant G., a police magistrate for the county of B., for giving intoxicating liquor to an Indian, and fined with committal to the county gaol of B. on nonpayment of the fine. The fine not having been paid, G. issued a warrant of commitment, directed to all the peace officers of B. to arrest plaintiff, and prepared a form of endorsement to be signed by a justice of the peace of H., authorising the defendant N., a constable, to arrest plaintiff in H. G. handed the warrant to N. telling him plaintiff lived in H. and he would have to get the warrant endorsed. N. took it to R., a justice of the peace for H., who signed the endorsement and plaintiff was arrested by N. and taken first before G. in B. to see if he would accept a note in payment, and then to the county jail of B. The plaintiff was afterwards discharged on *habeas corpus*, but the conviction was not quashed.

Held, [GALR, C. J., dissenting] that the action was maintainable against the defendants G. and R. : that there was no power enabling R. to endorse the warrant, and that he was guilty of trespass in so doing ; and that G. was liable as a joint trespasser, for by his interference he was responsible, not only for the arrest but for the subsequent detention in the jail of B. ; and that it was not necessary to quash the conviction before action brought, as the arrest in the county of H. was not anything done under a conviction or order within sec. 4 of R. S. O. ch. 73.

At the trial, the jury found that plaintiff had sustained no damage as against R. and they assessed the damages solely against G. Judgment was thereupon entered as against G., and the action dismissed as to R.

Held, that the finding of the jury as to the damages, was in law permissible ; but had R. been held liable, as plaintiff at most could only have had a new trial, or elect to retain his judgment as against G. alone, the court would not interfere with the finding.

Quære, whether the constable N. was protected under 24 Geo. II. ch. 24. The endorsement on the notice of action was that it was "given by V. M. of Queen Street, in the City of Brantford in the County of Brant, solicitor for the within named James Jones." Within was the notice, namely, "I do hereby as solicitor for and on behalf of James Jones of the village of Jarvis in the county of Haldimand, farmer," etc.

Held, that the notice taken in connection with Interpretation Act, 31 Vic. ch. 1, sec. 29, (U.) was sufficient. *Moran v. Palmer*, 13 C. P. 538, not followed as decided prior to said Act ; but *Quære*, whether any notice of action was necessary.

Form of order as to costs of N. given.

This action was tried before MACMAHON, J., and a jury, *Statement* at Cayuga, at the Fall Assizes of 1888.

It was an action of trespass for illegal arrest and imprisonment, against the defendants Grace and Rodgers,

Statement. who were justices of the peace, and against the defendant Norrie who was a constable.

The evidence was very voluminous, but may be summarized as follows:

The plaintiff was convicted before the defendant Grace (who is a police magistrate for the county of Brant) on 1st June, 1888, for giving intoxicating liquor to an Indian contrary to 49 Vic. ch. 43 (D.), and adjudged to pay a fine of fifty dollars and costs or to be committed to the common jail of the county of Brant for one month. The fine was not paid.

The plaintiff did not reside in the county of Brant, but in the adjoining county of Haldimand.

As the warrant could not be executed in the county of Brant, the defendant Grace, on 12th July, executed a warrant of commitment directed to all or any of the peace officers of the county of Brant commanding them or any of them to arrest the said plaintiff, and prepared a form of endorsement to be signed by a justice of the peace of the county of Haldimand, authorizing the defendant Norrie to arrest the plaintiff. This was signed by the defendant Rodgers, a justice of the peace for Haldimand.

The plaintiff was arrested under this warrant so endorsed and taken to jail at Brantford. He was afterwards discharged on habeas corpus but the conviction was not quashed.

This action was then brought.

The following were the questions submitted to the jury:—

1. Did the plaintiff James Jones unlawfully give intoxicating liquor to an Indian in Tuscarora township, in the county of Brant, on or about the 6th day of May, 1888? A. No.

2. Was there anything in the conduct of the defendant Grace, after he issued the warrant of commitment against the plaintiff James Jones, shewing that he did not honestly believe that there was no jurisdiction to arrest Jones in the county of Haldimand? A. Yes.

3. If Grace had not an honest belief that Jones could be arrested in Haldimand under the warrant of commitment, did he do anything or issue any instructions after the issue of the warrant of commitment which caused Jones's arrest? If so, what instructions did he give, and to whom

were they given? A. Yes; by issuing the warrant and sending it to Statement. Rodgers, Jarvis, Haldimand, by constable Norrie, for indorsement.

4. Did Rodgers, when he indorsed the warrant of commitment, act in the honest belief that he had authority, as such justice, to make the indorsement on the warrant which he did make? A. Yes.

HIS LORDSHIP.—You assess the damages against Grace \$125 and costs, and against Rodgers as nothing.

On these findings, the learned Judge entered judgment for the plaintiff, against the defendant Grace, for \$125 damages and costs, judgment for the defendant Rodgers, dismissing the action as against him with costs; and judgment for the defendant, Norrie, dismissing the action against him, but reserving the costs, it having been urged that he was protected under the provisions of 24 Geo. II. ch. 24.

In Michaelmas Sittings, 1888, the defendant Grace moved on notice to set aside the verdict and judgment against him, and to enter judgment in his favour.

The plaintiff also moved on notice to set aside the verdict and judgment in favour of the defendants Rodgers and Norrie, and to enter judgment against them.

During the same sittings, December 6th and 7th, 1888, the motions were argued.

McCarthy, Q. C., for the plaintiff.

Delamere and *Brewster*, of Brantford, for the defendant Grace.

Aylesworth, for the defendant Rodgers.

S. A. Jones, for the defendant Norrie.

The arguments and cases cited sufficiently appear from the judgment.

June 29, 1889. GALT, C. J.:—

The questions discussed on the argument, were as to the legality of the acts complained of and as to the jurisdiction of the respective magistrates; but it is, in my opinion, unnecessary to refer to them as I consider the defendants are protected under the provisions of sec. 4 of R. S. O. ch. 73,

Judgment.

GALT, C.J.

which enacts: "No action as mentioned in this Act." "[The first section had reference to actions for things done within the jurisdiction of a justice of the peace or by other officers. Section 2 for any act done by a justice of the peace where jurisdiction exceeded, or where he had no jurisdiction]" "shall be brought for any thing done under a conviction or order until the conviction or order has been quashed either upon appeal or upon application to the High Court; nor shall any such action be brought for any thing done under any warrant issued by such justice to procure the appearance of the party, and which has been followed by a conviction or order in the same matter until the conviction or order has been quashed as aforesaid."

The conviction has not been quashed.

In my judgment the motion of the defendant Grace must be made absolute to enter judgment in his favor dismissing the action with costs, and the motion of the plaintiff must be dismissed with costs.

ROSE, J.:—

On the argument of the motions, counsel for the plaintiff and Norrie agreed to let the motion to enter judgment against Norrie drop, without costs.

We have, therefore, to consider the propriety of the judgment for the other parties.

The first question I will consider is, whether there was any authority to back the warrant of commitment after conviction, so as to justify the arrest of the plaintiff—the defendant in *Regina v. Jones*—in Haldimand, the conviction being had and the warrant issued in Brant.

In England there is express provision for backing such a warrant; see 11 & 12 Vic. chs. 42 & 43; but it is contended that no similar provisions are to be found in our statutes, which have been, for the most part, taken from the English Acts.

Sections 49 of R. S. C. ch. 174, and 22, 29, 32 and 63 of R. S. C. ch. 178, have been relied upon by the defendants as shewing the intention to give power to back all warrants,

Section 49, of ch. 174, as it appears to me, provides for backing a warrant of apprehension before hearing. The effect of the backing is said to authorize the execution of the warrant, and the bringing of the person apprehended before the justice issuing the warrant, or some other justice, as therein provided.

Judgment.
ROSE, J.

Sections 29-32 of ch. 178, provide for warrants to apprehend disobedient witnesses, and for backing same.

Section 63 provides for backing a warrant of distress, but gives no power to apprehend.

Section 22 was much pressed upon us. The opening words are, "If any person against whom *any* warrant has been issued is not found within the jurisdiction," &c.; and it was urged that this applied to all warrants; but the concluding words of the section are, "and to carry the offender, when apprehended, before the justice who first issued the warrant, or some other justice having the same jurisdiction;" words clearly inapplicable to a warrant of apprehension after conviction, which directs the constable to convey the offender to jail, and not to take him before the magistrate.

Mr. Delamere referred to the marginal reference to sec. 22 in the Revised Criminal Law, in the separate volume, which is, "Indorsing the warrant in another jurisdiction [11 & 12 Vic. ch. 42, sec. 11; ch. 43, sec. 3];" and argued that this indicated the intention to make sec. 22 apply to all warrants. But it was answered with great force that sec. 3 of ch. 43 contained words which made the provisions as to backing apply to all warrants, *i. e.*, "to all warrants of commitment issued under and by virtue of this Act;" and that the omission of such words indicated an intention not to give power to back a warrant of commitment after conviction.

I come to the conclusion, therefore, that there was no power or authority enabling the magistrate in Haldimand to back the warrant in question.

It is therefore clear that the arrest in Haldimand was unwarranted and a trespass.

Judgment.

ROSE, J.

It is further clear under *Hoover v. Craig*, 12 A. R. 72, and cases there referred to, that the illegal arrest in Haldimand made the trespass a trespass *ab initio*, and although the conviction and warrant were valid in Brant the arrest in Haldimand being an abuse of authority made every thing done under them void.

See also Paley on Convictions, 6th ed., p. 516; *Reid v. Maybee*, 31 C. P. 384, 393; *Regina v. Cumpton*, 5 Q. B. D. 341.

The next question is whether, assuming the person making the arrest to have been a trespasser, did the defendant Grace by what he did become a joint trespasser? Upon issuing the warrant of commitment he gave it to the constable and told him that he understood Jones lived in Jarvis, and that being so he would have to get the warrant endorsed. Grace drew the form of endorsement on the back of the warrant.

On cross-examination he stated as follows:

"Mr. Oaler, to witness—You drew the endorsement for the backing of the arrest in the other county? A—I did.

Q—And you knew when issuing your warrant that that was the way it would have to be executed? A—Yes.

Q—And you intended to have it valid by having it endorsed? A—That was my intention.

Q—You intended to fetch the man to Brantford? A—Certainly.

Q—And on the 13th of July you got a telegram after the man was arrested from the constable? (Telegram produced.) A—Yes, I got a telegram from Norrie (a).

Q—And your answer to that was "no"? A—It was "no." The question was whether I would take an endorsed note, and, not knowing what the endorsement would be, I said "No."

Q—You occasionally do take an endorsed note? A—Never, not for fine and costs.

Q—Sometimes for the costs? A—No, I never take a note in connection with my magisterial duties.

Q—It is gaol or pay? A—Yes.

Q—But still you were willing to take Hamilton's note? A—Yes, but I did not get it.

Q—You kind of wanted Hamilton's note? A—No, I did not want it; I said I would take it."

(a) The telegram was as follows:

"To JAS. GRACE:

Will an endorsed note for the amt. be all right re *Queen v. Jones*?

THOS. NORRIS."

The last answer referred to the fact that Jones was brought to Brantford after the arrest; and the following is Grace's account of what then took place:—

Judgment.
Ross, J.

"Q—Where next did you see the defendant? A—I saw him the day he was arrested. Nofrie brought him to my house the evening of the day he was arrested.

Q—What was he brought there for? A—To ask if I would take a note or some security from some one in the city to pay the fine and costs. Several names were mentioned and amongst them Mr. Hamilton, and I said, yes, I will take Hamilton's note payable in ten days for the fine and costs.

Q—Did you see him after that at all? A—I did not."

Grace's duty had been performed when he made the conviction and issued his warrant. The duty to execute the warrant was upon the constable. From Grace's evidence and acts I think there was sufficient to warrant a finding that he had so interfered in causing the arrest as to make himself liable—subject to certain questions raised by his counsel and which we now will consider.

It was objected that the notice of action was not sufficient in form, the endorsement not containing a statement of the plaintiff's "place of abode."

The endorsement was:

"This notice of action is given by Valentine Mackenzie of Queen Street, in the city of Brantford, in the county of Brant, solicitor for the within named James Jones." Within was written as follows: "I do hereby as the solicitor for and on behalf of James Jones of the village of Jarvis in the county of Haldimand, farmer, etc."

Moran v. Palmer, 13 C. P. 528, following *Collins v. Hungerford*, 7 Ir. C. L. R. N. S. 581 (1857) was relied upon, and is an authority in the defendant's favor.

When that case was decided sec. 35 of the Interpretation Act was not in force, having been passed in 1868, 31 Vic. ch. 1, sec. 29, at least it was not referred to, and unless I have overlooked its presence it did not appear in any statute earlier than 31 Vic.

It read as follows:

"Where forms are prescribed, slight deviations therefrom not affecting the substance or calculated to mislead, shall not vitiate them."

Judgment.

ROSE, J.

Such a deviation is the one in question. See also *Green v. Hutt*, 51 L. J. N. S., Q. B. D. 640. I think therefore *Moran v. Palmer* should not now be followed.

I have dealt with this objection as if the defendant Grace was entitled to notice of action. This was contested. I say nothing as to it as I have found the notice sufficient. *Friel v. Ferguson*, 15 C. P. 584, at p. 597, may be referred to.

It was further objected that the action did not lie while the conviction remained unquashed.

I am unable to accede to this view. There is and can be no objection to the conviction or the warrant founded thereon. A motion to quash, for all that appears here, must fail. It can be only necessary to quash the conviction when its production would justify the act done. While it remains in force the person convicted cannot dispute the jurisdiction of the magistrate as to any thing appearing on its face. It must be taken to afford complete evidence of the right and power of the magistrate to hear and determine and make the order or conviction founded on the hearing, and the warrant and proceedings thereupon must be taken to have been proper so far as ordered thereby.

But here after the warrant had issued pursuant to the conviction, and under it, the magistrate and constable agree to do something which neither the conviction nor the warrant justified, viz., arrest the defendant in an adjoining county out of the magistrate's jurisdiction and beyond the county within which the constable was commanded to act. This was not "any thing done under a conviction or order" within the wording of sec. 4 of R. S. O. 1887, ch. 78, and, therefore, such section does not, in my opinion, afford any protection in this case.

See *Milton v. Green*, 5 East 233, under the prior statutes.

It was assumed at the trial that under the Act, 24 Geo. II. ch. 24, sec. 6, the constable was not liable. The question discussed in *Milton v. Green* as to the constable exe-

cuting the warrant out of the jurisdiction depriving him of the protection of the Act has not been discussed before us as the plaintiff asks nothing against him. Mr. Jones, who appeared for him, suggested that the endorsement became part of the warrant; and, therefore, that, so far as the constable was concerned, it was the same as if the warrant had contained a direction to the constable to execute it in Haldimand; citing *Clark v. Wood*, 2 Ex. 393, at 584, p. 405; *Friel v. Ferguson*, 15 C. P. 599; *Regina v. Weil*, 9 Q. R. D. 701.

Judgment.
ROSE, J.

As I have said it does not become necessary further to consider this.

As I have pointed out the illegal arrest in Haldimand constituted the act a trespass *ab initio*, and therefore the detention in Brant cannot be justified under the conviction and warrant. The finding against Grace must therefore stand as he is liable not only for the arrest in Haldimand, but for the subsequent detention in Brant.

As to Rodgers, the jury have not found any damages against him, and have assessed the damages solely against Grace. This as a matter of law was permissible. See *Clissold v. Machell*, 25 U. C. R. 80.

The act of endorsing or backing a warrant is purely ministerial. See cases collected in Paley on Convictions, 6th ed., p. 24, where it is said that, "The backing of a warrant for this purpose is a purely ministerial act, and the justice who issues it is responsible for an arrest under it though the warrant is backed and executed in another county," citing *Clark v. Woods*, 2 Ex. 393, and other cases.

As under *Clissold v. Machell*, if Rodgers should have been held liable the plaintiff at the most could only have a new trial or elect to retain his verdict against Grace alone, we see no reason to interfere with the finding and judgment as to him.

The result will be that as to Norrie the motion by plaintiff will be dismissed without costs as agreed. Grace asked nothing in his notice of motion against Norrie, and service of the notice upon Norrie advising him that Grace was

Judgment. seeking to have a nonsuit entered or a new trial as against the plaintiff, but not as to him, did not entitle Norrie to appear and ask for costs and none can be given to him. The question of Norrie's costs of the action remains to be disposed of by the trial Judge. (a)

ROSE, J.

Grace's motion for nonsuit will be dismissed with costs.

The plaintiff's motion to have judgment entered against Rodgers will be dismissed with costs.

As no motion has been made to relieve Grace from the order to pay full costs the judgment against him for \$125 and costs must remain undisturbed.

MACMAHON, J., concurred with **ROSE, J.**

Judgment accordingly.

(a) The order made by the trial Judge, as to Norrie's costs, was as follows: "I order that the plaintiff do pay to the defendant Norrie, his full costs of defence; and that upon the taxation of costs herein by the plaintiff, as against the defendant Grace, such costs so taxed shall include such costs as the plaintiff is liable to pay to the defendant Norrie. And I further order that the amount of such costs, so payable to defendant Norrie, be paid into Court to the credit of this cause by the defendant Grace, to be subject to the order of the defendant Norrie."

[COMMON PLEAS DIVISION.]

THE OWEN SOUND STEAMSHIP COMPANY

v.

THE CANADIAN PACIFIC RAILWAY COMPANY

AND

THE ONTARIO AND QUEBEC RAILWAY COMPANY.

Railway Company—Agreement to pay minimum sum out of joint traffic rates—Ultra vires—Legislation legalizing.

By an agreement entered into between the plaintiffs and the Toronto, Grey, and Bruce Railway Company, it was agreed that there should be certain joint rates chargeable to passengers and freight by the steamship company and the railway company to be divided in certain proportions; and if it should be found that the proportion payable to the steamship company did not at the end of the season amount to the sum therein stipulated, then that the deficiency should be made good by a rebate from the share of the railway company; and, on the other hand, if the steamship company received more than the sum mentioned in the agreement, the railway company were entitled to a share of the surplus. Subsequently, an agreement was entered into whereby the Toronto, Grey, and Bruce Railway Company leased their line to the Ontario and Quebec Railway Company, the latter agreeing to assume the contract with the plaintiffs. This agreement was ratified by Act of Parliament. The Ontario and Quebec Railway Company made a lease of their line to the Canada Pacific Railway Company which was confirmed by Act of Parliament, and by which Act the Canada Pacific Railway Company were to assume all contracts of the Toronto, Grey, and Bruce Railway Company, including the one with the plaintiffs.

Held, that, even if the agreement between the plaintiffs and the Toronto Grey, and Bruce Railway Company were *ultra vires* the latter company, it was made valid by the subsequent legislation; but, apart therefrom, it was in no sense objectionable.

THIS was an action tried before STREET, J., without a Statement. jury, at Toronto, at the Fall Assizes of 1888.

The action was brought on an agreement, bearing date the 7th July, 1883, made between the plaintiffs and The Toronto, Grey, and Bruce Railway Company, respecting the running of certain steamboats therein mentioned, and providing for the distribution of the money received from freight and passengers.

At the close of the case the learned Judge directed judgment as follows:

"I direct the claim of plaintiffs in the fifth paragraph of the statement of claim to be dismissed. Reference to Mr.

Statement. Winchester to take accounts of the dealings and transactions between the parties, and the amount due by one to the other for the season of 1883, upon the footing of the contract between the plaintiffs and the Toronto, Grey, and Bruce Railway Company, including the guarantee of the latter of a minimum sum per diem. Also an account of the sums received by each party on account of the other during the season of 1884, the contract being treated for the purpose of the latter account as having terminated on the 4th January, 1884.

Both parties moved on notice to set aside or vary the said judgment.

In Michaelmas Sittings, November 19, 1888, *D. E. Thomson* and *G. Bell*, supported the plaintiffs' motion and shewed cause to the defendants'. The agreement is a subsisting agreement for the years 1883, 1884, 1885, and the plaintiffs are therefore entitled to recover the full amount of their claim.

McCarthy, Q. C., and *G. T. Blackstock*, contra. The agreement was *ultra vires*, of the Toronto, Grey, and Bruce Railway Company, and therefore the stipulation as to the minimum rate was void and not binding on defendants.

June 29, 1889. GALT, C. J. :—

The agreement contains a provision empowering the railway company to put an end to the arrangement in the beginning of the year 1884. Shortly after this agreement was made, viz., on the 26th July, 1883, an agreement was entered into between The Toronto, Grey, and Bruce Railway Company, and The Ontario and Quebec Railway Company, whereby the former agreed to lease their line of railway to the latter, and the latter agreed to assume "the contract between The Toronto, Grey, and Bruce Railway Company, and The Owen Sound Steamship Company for the line of steamers "Magnet," "Spartan," and "Africa."

This agreement was ratified by an Act of the Parliament of Canada, passed on the 19th April, 1884.

On the same day an Act was passed entitled "An Act to confirm the lease of The Ontario and Quebec Railway to The Canadian Pacific Railway Company, and for other purposes." By this Act The Canadian Pacific Railway Company assume all contracts entered into with The Toronto, Grey, and Bruce Railway Company. The lease thereby ratified was executed by the lessors on 4th January, 1884, and by the lessees on 23rd January, 1884.

Judgment.
GALT, C.J.

It is under these agreements this action is brought against these defendants who were no party to the original agreement.

By the third paragraph of the statement of claim, the plaintiffs allege "that the said freight and passenger traffic shall be carried on and charged for in accordance with the rates set forth in the schedule annexed to said deed, and that the receipts from the said freight and passengers interchanged between the said Toronto, Grey, and Bruce Railway Company, and the plaintiffs, should be divided between them in the proportion set out in the said schedule of rates, and that the aggregate amount of the gross receipts of the plaintiffs during the season of navigation in each of the years 1884 and 1885" (this is evidently a mistake, as it omits the year 1883), "should be for the steamer 'Magnet,' \$160 per day; for the steamer 'Spartan,' \$160 per day, and for the steamer 'Africa,' \$110 per day; and that the said Toronto, Grey, and Bruce Railway Company should, in the event of all the receipts of the plaintiffs not amounting during each season to the amount so agreed upon, allow and pay to the plaintiffs, by way of rebate, from the receipts of the said railway company, on all traffic interchanged as aforesaid, a sum sufficient to make the gross receipts of the plaintiffs up to the amount so agreed upon."

The fourth paragraph is not disputed.

The fifth paragraph contains the same objections as the third; but claims for breaches of the agreement after February, 1884.

As the learned Judge held at the trial that the agreement was at an end after February, 1884, he dismissed this

Judgment. claim ; and, as I am of the same opinion, it is unnecessary
GALT, C.J. to set out this paragraph.

The sixth and 7th paragraphs then claim for moneys due on the said steamers, and for money not paid by the defendants to the plaintiffs on the accounts between them.

The defendants in their first paragraph admit the contract ; but contend that the Toronto, Grey, and Bruce Railway Company had no authority to enter into such contract ; and that in consequence the defendants are not bound by the terms of it.

This in reality is the sole ground of contention.

There are other paragraphs setting out the correspondence proving that the contract was put an end to ; but it is unnecessary to set them out.

I have already said, in referring to the statement of defence, that the defendants have set out the correspondence respecting the termination of the contract in January, 1884, and I fully concur in the opinion expressed by the learned Judge that the agreement was thereby concluded. This disposes of the motion of the plaintiff.

The objection made by the defendants rests entirely on the question whether the agreement was *ultra vires* the Toronto, Grey, and Bruce Railway Company ; and, if so, whether they are bound by the stipulation to pay a minimum rate to the steamer. It is not disputed that a reference must be had as to the accounts between the parties.

I will assume for the moment that the railway company were not authorized to pledge the earnings of the railway ; in other words to agree that in case of a deficiency in the earnings of the steamboat company the deficiency should be made up out of the joint receipts ; and, if so, then the case of *Colman v. Eastern Counties R. W. Co.*, 10 Beav. 1, would apply, had an application been made by a shareholder to restrain the directors from entering into such a contract ; but this is not so, no complaint is made by any shareholder of the company, and in fact, so far as the shareholders are concerned, they had ceased to have any interest in the matter within a fortnight after it was

made, for on 26th July, 1888, the defendants, the Ontario and Quebec Railway Company, had entered into an agreement with the Toronto, Grey, and Bruce Railway Company to lease their railway at a certain fixed rent, and had expressly agreed to assume this contract described in the schedule as "contract between the Toronto, Grey, and Bruce Railway Company, and the Owen Sound Steamship Company for the line of steamers "Magnet," Spartan," and "Africa."

Judgment.
GALT, C.J.

It is to be assumed that when the Ontario and Quebec Railway Company assumed this lease they had made themselves acquainted with the provisions contained in the contract; and moreover they applied to the Legislature to confirm this lease and agreement, which was done by 47 Vic. ch. 61; they availed themselves of the services of the said steamers for the year 1883, and are in my opinion estopped from denying its validity so far as the transactions of that year are concerned.

Then as to the defendants the Canadian Pacific Railway Company. By an agreement executed by the Ontario and Quebec Railway Company on 4th January, 1884, and by the Canadian Pacific Railway Company on 23rd January, 1884, the Canadian Pacific Railway Company expressly assume all contracts entered into by the said Toronto, Grey, and Bruce Railway Company in relation to operating the traffic of the said last mentioned company's line, and of all rentals and charges in connection with any wharves, steamers, lands, or other property or equipment "used by or service rendered to the said Toronto, Grey, and Bruce Railway Company in connection with the operation of its line, the whole as more particularly set forth in the deed of lease of the Toronto, Grey, and Bruce Railway Company to the lessors hereinbefore referred to, and in the schedule thereto annexed." This schedule embraces the agreement now in question. This lease was ratified by the Act 47 Vic. ch. 54, (D.) and is, in my opinion, conclusive against these defendants.

Judgment.

GALT, C.J.

I have been considering the case, assuming the agreement with the plaintiffs to be *ultra vires* of the Toronto, Grey, and Bruce Railway Company; but, in my opinion, the agreement is unobjectionable. There is no undertaking on the part of the railway company to apply any of their funds to paying the steamship company. The agreement amounts to this: there shall be certain joint rates chargeable to passengers and freight by the steamship company and the railway company, to be divided in certain proportions, and if it should be found that the proportion payable to the steamship company did not at the end of the season amount to the sum therein stipulated, then that the deficiency should be made good by a *rebate* from the share of the railway company; and, on the other hand, if the steamship company received more than the sums mentioned in the agreement, the railway company were entitled to a share of the surplus. This is manifest from the provision at the end of the thirteenth condition of the agreement: "And it is further agreed that the accounts of the said company shall, as far as practicable, be adjusted monthly, and the final adjustment shall be made, and the above *rebate*" (this refers to both the cases I have mentioned) "allowed, and the balance due to either party paid over at or as soon as may be after the close of the navigation in each season."

Both motions must be discharged. There will be no costs.

ROSE, J.:—

On the argument I was convinced that the agreement had been put an end to by the notice, and that the plaintiff company had so treated it, and only fell back upon it, or endeavoured to do so, when satisfactory arrangements could not be come to, in order to perfect a new agreement.

Further consideration has confirmed me in that view; and I cannot feel any doubt that as to it my learned brother Street arrived at the proper conclusion at the trial.

Upon the question of *ultra vires*, I am inclined to accept

the view of the learned Chief Justice, that the agreement to secure to the plaintiff company a minimum sum out of the joint earnings was not within the objection taken, as it may well be urged that the fund out of which the amount would be paid would not have been in existence but for the agreement.

Judgment.
Ross, J.

The general assets of the railway company were not pledged by the agreement, but only the fund created by the joint venture, *i. e.*, the joint earnings, and so long as the claim is confined by the agreement to such sum, it is difficult to apply the reasoning of the cases cited to the argument of *ultra vires*.

As to the agreement by the railway company to give all the traffic to the plaintiffs' company, which was urged to have been in contravention of sec. 60 of the Consolidated Railway Act of 1879, it is clear that such section is not applicable as it refers to railway companies only.

But whether any difficulties, such as suggested, existed at the date of the agreement, it seems to me clear beyond reasonable doubt that the effect of the legislation, chs. 54 and 61 of 47 Vic., (D.) was to remove all question—to validate all that otherwise would have been invalid—and to empower the railway companies to carry out the agreement in question, which agreement was sufficiently referred to in the Acts, and which I cannot doubt it was intended should be embraced in the vitalizing clauses of the Acts.

As to the costs, I also agree as to what was done by my learned brother Street, even were his discretion a proper subject for review. The railway companies opposed the whole claim of the plaintiff as to the minimum sum, and so the hearing or trial was necessary. So far as the plaintiff company increased such costs by its unsuccessful claim, the order has protected the defendants.

I agree that the motions should be discharged without costs.

MACMAHON, J., concurred.

Motion dismissed.

[COMMON PLEAS DIVISION.]

REGINA V. DOWLING.

Justice of the peace—Fraud on cheese factory—51 Vic. ch. 32, (O.)—Offence outside of county—Jurisdiction of police magistrate—Certiorari—Ultra vires.

The defendant was tried at Belleville before the police magistrate of the county of Hastings and convicted, for, amongst other things, supplying milk from which the cream or strippings had been taken or kept back. The factory was in Hastings, but the defendant resided and the milk was supplied in the county of Lennox and Addington.

Held, that the police magistrate of Hastings had no jurisdiction to try the offence and the conviction must be quashed.

Held, also, that *certiorari* has not been taken away in such cases ; but, even if it had, the court would not be justified in refusing to examine the evidence to see if the magistrate had jurisdiction.

Statement. THIS was an application to quash four convictions made under 51 Vic. ch. 32, (O.), amongst other things, for supplying milk from which the cream or strippings had been taken or kept back.

In Michaelmas Sittings, 1888, *Shepley*, supported the order *nisi*.

Burdett and *Holman*, contra.

June 29, 1889. ROSE, J. :—

The convictions were under 51 Vic. ch. 32, (O.), and so far as necessary for the consideration of these motions were for supplying milk from which cream or strippings had been taken or kept back.

The defendant did not live in Hastings, but in the adjoining county of Lennox and Addington. The factory was in Hastings. The magistrate was the police magistrate for Hastings, and the trial was in Belleville.

One Gould managed the factory, and hired a man^o to go to the stand at which the defendant delivered the milk, being in Lennox and Addington, and there accept the milk, and take it to the factory.

Gould's evidence on this point was as follows: "I am the owner of cheese factory. I employ milk driver. I generally take milk from patrons from the stand; they put the milk on the stand. The milk drawer is supposed to be responsible for the milk after he takes possession of it."

Judgment.

ROSE, J.

Joshua Sager said: "I have drawn the milk from Dowling to Gould's cheese factory, me and my boy. I cannot say whether I or my boy drew on 6th and 15th. * * Mr. Gould hired me to draw the milk."

The convictions were for offences committed in the county of Hastings.

The statute makes it an offence to supply to a cheese or butter manufactory, or the owner or manager thereof to be manufactured, milk from which cream has been taken or strippings held back.

I am clearly of the opinion that the supplying was not within Hastings but within Lennox and Addington, and so not an offence within the jurisdiction of the police magistrate.

Certiorari has not been taken away in this case, and even if it had I would not think that the Court would be justified in refusing to examine the evidence to see if the magistrate had jurisdiction. I need not repeat what I have said at length in *Regina v. Elliott*, 12 O. R. 524.

I may also refer to the 6th ed. of Paley on Convictions, pp. 124, 132 to 143, 197 to 204, 207, and 430.

I have not overlooked the case of *Regina v. Ambrose* 16 O. R. 251, to which I was referred.

As the conviction must in my opinion be quashed on the above ground it is unnecessary to consider any of the other objections urged.

The Act has by the decision in *Regina v. Wason*, 17 O. R. 58, been held by the Judges of the Queen's Bench Division *ultra vires* the Ontario Legislature. As this question was not argued before us we express no opinion upon it.

The order must go to quash the several convictions without costs, and with the usual order of protection.

GALT, C. J., and MACMAHON, J., concurred.

[COMMON PLEAS DIVISION.]

BALZER V. THE CORPORATION OF THE TOWNSHIP OF GOSFIELD SOUTH AND THE CORPORATION OF THE COUNTY OF ESSEX.

Municipal corporations—Assumption of township road by county—Liability of county—Remedy over against township—Municipal Act, secs. 531, sub-secs. 1, 4, 533, 566, sub-sec. 5—Construction of.

Action by plaintiff for damages for the loss of his horse which was killed by falling into a ditch dug by the township, on a road therein, under a drainage by-law. The township council had passed a by-law for opening and establishing this road, and shortly after the county council had passed a by-law, "assuming the road as a county road of the said county for the purpose of expending thereon the county appropriation, and for such purpose only." The money of the county was expended from year to year on the said road. The county by-law was proposed or seconded by the township reeve, and its validity, although never assented to by by-law, was never disputed by the township.

Held, that by their by-law the county had assumed the road as a county road, and there was no power in the statute authorizing them to limit the assumption in the manner proposed; and that under the circumstances the county could not set up the absence of a township by-law assenting to the assumption.

Secs. 533 and 566, sub-sec. 5 of R. S. O. ch. 184, relied on by the county, were held not applicable to this case.

Held, also, that the county, under sec. 531, sub-sec. 1, were bound to keep the road in repair and were liable to plaintiff, but under sub-sec. 4, they were entitled to judgment over against the township.

Statement. THIS was an action tried before STREET, J., and a jury, at Sandwich, at the Spring Assizes of 1889.

The action was brought to recover damages for the loss of a horse which was killed by falling into a ditch dug by the township on a road known as the Western Division Road, within the township, under a drainage by-law, which ditch was unfenced and encroached to nearly one half the width of the road, and beyond dispute was very dangerous.

The township in their statement of defence alleged that the road in question had been opened as a county road by a by-law passed by the county council on 16th June, 1881, and had ever since been under the jurisdiction of the county council. They further alleged that the accident happened through the negligence of the plaintiff.

The county in their statement of defence denied the ^{Statement.} assumption by them of the road in question as a county road, and of any responsibility on their part to maintain the ditch and highway, or either of them. They also alleged negligence on the part of the plaintiff.

Certain questions were submitted to the jury by the learned Judge, and upon their answers he gave the following judgment :

" Upon the findings of the jury I order that judgment herein be entered on or after the fifth day of the next sittings of the Divisional Court for the plaintiff against the defendants, the corporation of the County of Essex, for \$350, with full costs of the action ; and that the said last mentioned defendants do have judgment entered in their favour, at or after the date of the entry of such judgment against them by the plaintiffs to recover over from the defendants, the corporation of the township of Gosfield South, the amount of the judgment to be entered for the plaintiff against the defendants, the corporation of the county of Essex, including the plaintiff's costs taxed therein."

The defendants, the corporation of the county of Essex, gave notice of motion to set aside the judgment for the plaintiff, and to enter judgment for the defendants, the county.

The defendants, the corporation of the township of Gosfield South, moved to set aside the judgment against them, and to have judgment entered in their favour.

In Easter Sittings, June 4th, 1889, the motions were argued.

Aylesworth, for the defendants, the corporation of the county of Essex.

W. R. Meredith, Q.C., for the defendants, the corporation of the township of Gosfield South.

Lush, Q. C., for the plaintiff.

Argument.

The following cases were referred to: *Corporation of Pembroke v. Canada Central R. W. Co.*, 3 O. R. 503; *Regina v. Corporation of Perth*, 6 O. R. 195.

June 29, 1889. GALT, C. J. :—

Before considering the questions raised by the defendants I may state that on the findings of the jury supported as they are by the evidence, there is no question as to the right of the plaintiff to recover damages for the loss sustained by him.

The fact that the road in question was a township road unless assumed by the county was undisputed.

The council of the township on the 28th May, 1881, passed a by-law for opening and establishing this road. On the 16th June, 1881, the county council passed a by-law "assuming the road as a county road of the said county of Essex for the purpose of expending thereon the county appropriation, and for such purpose only."

At the trial it was urged that this was no assumption, and that there was no assent on the part of the township by by-law. It was proved, however, that the money of the county had been expended from year to year on the road; and it was proved that the reeve of the township proposed or seconded the by-law, and the township had never disputed its validity. The learned Judge held that the road was a county road, and that the county was responsible to the plaintiff. He, therefore gave judgment in his favor against the county, and, so far as the plaintiff was concerned, dismissed his action against the township. The learned Judge then held (under the circumstances to which I am about to refer) that the township was responsible to the county, and gave judgment against them; the fact being that in the year 1881, the municipal council had passed a drainage by-law under which the ditch in question had been cut by them.

I will consider now the motion of the county. The motion is: Judgment.

GALT, C.J.

1. That the verdict is contrary to law and evidence. This point I have already considered.

2. That the Western Division Road had not been assumed by the corporation of the county of Essex at all, or had not been assumed by by-law with the assent of the corporation of the township of Gosfield South, and was not under the jurisdiction of the corporation of the county of Essex, but was under the jurisdiction of the township of Gosfield South; and also claiming their costs against the township.

Mr. Aylesworth in his argument referred to sec. 533. (I may mention that throughout this judgment when I refer to a section I have reference to the Municipal Act, R. S. O., ch. 184). This section does not apply to the present case, for the road now in question was not a township or county boundary line (This branch of his argument was directed to the effect of the moneys expended by the county on the road). He referred also to sec. 554. This has reference not to a road within any municipality but to roads passing from or through an adjoining municipality, and appears to me to have reference rather to township than county municipalities.

The next sec. was 566, sub-sec. 5, which authorizes a county council to pass by-laws for granting to any township aid by loan or otherwise towards opening or making any road, &c., in the township, in cases where the council deems the county at large sufficiently interested in the work to justify such assistance, but not sufficiently interested to justify the council in at once assuming the same as a county work.

There can be no question as to the power of a county to grant aid to a township under this clause in cases where the council does not consider the road under consideration to be of such importance as to justify the council in assuming it as a county road; but in the case now before us the council did assume it as a county road. It is true there is

Judgment. a qualification added ; but I see nothing in the statute to authorize the council to pass a by-law opening the road as a county road, and at the same time to limit the assumption in the manner proposed. Moreover to bring the council within the sub-section it appears to me necessary that the amount intended to be lent or advanced should be stated.

GALT, C.J.

It was then urged that as there was no by-law on the part of the township the county council had no power to assume the possession of the road. In considering this view it must be borne in mind that, so far as the present contention is concerned, there is no allegation on the part of the township that they did not assent to the by-law, on the contrary they have always acted under it, and received whatever money they could get from the county.

It appears to me, therefore, the county cannot now be heard to say they are not liable to the plaintiff for injury sustained owing to the road being out of repair, because although true it is they assumed the road, they are not responsible because their assumption was not assented to by by-law on the part of the township. As to the duty of a county council after assuming a road, see *Rose v. Corporation of Stormont, etc.*, 22 U. C. R. 531.

This motion, therefore, so far as the plaintiff is concerned, must be dismissed with costs.

I will consider the matter of the costs as between the county and township hereafter.

The motion of the township was : that the judgment is contrary to law and evidence : that the road upon which the damage was sustained is a road assumed by the county council, and is wholly under the jurisdiction of the county of Essex ; and, if they are found liable, then for a new trial on the merits, and in reduction of damages, if any.

Mr. Meredith, contended that as the learned Judge held at the trial that this was a county road the township is not liable.

The section under which this judgment was given is sec. 531, sub-sec. 1 and 4.

Sub-sec. 1. "Every public road, street, bridge, and highway shall be kept in repair by the corporation, * * and * * the corporation * * shall be civilly responsible for all damages sustained by any person by reason of such default."

Judgment.
GALT, C.J.

It was under this sub-section judgment was given against the county.

Sub-sec. 4. "In case an action is brought against a municipal corporation to recover damages sustained by reason of any obstruction, *excavation* or opening in a public highway * * made, left or maintained by another corporation * * the corporation shall have a remedy over against the other corporation or person for, and may enforce payment accordingly of, the damages and costs, if any, which the plaintiff in the action may recover against the municipal corporation."

It was urged by Mr. Meredith that as the ditch was constructed under a drainage by-law, the construction was legal, and no action could be maintained. This does not appear to me to be correct. The county council were bound to keep the road in repair. It was out of repair by reason of an excavation made by the township council, consequently the county were responsible. It was a matter of indifference to the plaintiff as to what occasioned the defect. Then, under the express provisions of sub-sec. 4, where an action is brought to recover damages by reason of any excavation made by another corporation, the corporation shall have a remedy over against the other corporation.

The only remaining question is as to the costs of the county which they claim shall be paid by the township.

The question of costs was for the learned Judge at the trial, and I do not see how we can interfere.

Both motions will be dismissed with costs to the plaintiff; no costs as between the county and township of these motions.

ROSE and MACMAHON, JJ., concurred.

[COMMON PLEAS DIVISION.]

SINDEN V. BROWN.

Justice of the Peace—Action against—Summary Convictions Act—Imprisonment for non-payment of fine after payment of costs.

A conviction under the Summary Convictions Act, required the defendant to pay a fine and costs; in default of payment distress, and in default of sufficient distress imprisonment. The plaintiff paid the costs, and was subsequently arrested and imprisoned for non-payment of the fine. The conviction and commitment remained in force unquashed. In an action of trespass for false imprisonment.

Held, that the conviction could be enforced by imprisonment for non-payment of the fine notwithstanding the payment of the costs, and therefore with the conviction remaining in force, the action was not maintainable.

The law laid down in *Trigerson v. Board of Police of Cobourg*, 6 O. S. 405, not followed in this respect.

Statement. THIS was an action of trespass for false imprisonment against a justice of the peace.

The cause was tried before ARMOUR, C.J., and a jury, at Simcoe, at the Spring Assizes of 1889.

The plaintiff was convicted for a violation of the second part of the Canada Temperance Act for selling liquor, and was required to pay the sum of \$50 and \$6.95 costs; in default of payment, distress; and, in default of sufficient distress, imprisonment, &c.

The plaintiff, before arrest, paid the costs. Subsequently a warrant of commitment was issued for non-payment of the fine, under which the plaintiff was imprisoned. It was urged that there was no right to enforce the conviction by imprisonment for non-payment of the fine after payment of the costs.

The conviction and commitment remained in force unquashed.

The learned Chief Justice withdrew the case from the jury, and gave judgment for the defendant, dismissing the action with costs, stating as follows: "Whatever was done was done as a justice of the peace; the conviction is not quashed, and no notice has been given within six months. On all these grounds I think you fail."

In Easter Sittings 1889, *Mackenzie*, Q.C., moved to set Argument aside the judgment for defendant and for a new trial.

In the same sittings May 23, 1889, *V. Mackenzie*, Q.C., supported the motion.

E. Martin, Q. C. contra.

June 29, 1889. ROSE, J.:—

The plaintiff's contention involves the proposition that if a defendant, who has been adjudged to pay a penalty and costs, manages to induce the magistrate to accept the costs, or ever so small a sum on account of penalty and costs, there remains no power to enforce payment of the balance.

It is clear having regard to the provisions of secs. 97, 98, of R. S. C. ch. 178, that the commitment is not intended as a punishment, but as a means of coercion to pay the penalty and costs. See *Regina v. Morris*, 21 U. C. R. 392, at p. 395, and *Regina v. Good*, in which we have just delivered judgment. (a)

I would have had no difficulty in at once coming to the conclusion that the contention was quite untenable, had it not been for the judgment in *Trigerson v. Board of Police of Cobourg*, 6 O. S. 405, cited by Mr. Mackenzie.

In that case there was a levy of part by distress, and a return that the party had no more goods, and imprisonment for the remainder of the penalty.

The plea setting up the facts in answer to an action of trespass for false imprisonment was held bad for many reasons, one of which was stated as follows: "Because, the plaintiff had been imprisoned after part of the fine had been paid, which is against law."

This is the only authority cited, and I have looked through many books and have found none to the like effect.

The case of *Regina v. Wyatt*, 2 Ld. Raym. 1189, and 11 Mod. 54, referred to in Burn's J. P., 30th ed., vol. i., p. 867, and Paley on Convictions, 6th ed., 323-326, is authority only for the proposition by Holt, C. J., that "if a man is

(a) Post p. 725.

Judgment. under three convictions, and his goods are sufficient to
ROSE, J. answer two of them, the money shall be paid and he shall stand in the pillory for the third; but on one conviction, if he want but two shillings in the whole, the justices cannot take it, but he must be imprisoned, and stand in the pillory for it afterwards."

Powell, J., said: "The return is necessary; because he may levy only part, and then further process should go out: for if the whole cannot be levied, then the justices must go upon another part of the Act."

This case is referred to as deciding that where a penalty and corporeal punishment in substitution are awarded, there cannot be a collection of part of the penalty and infliction of the punishment, as it is said the law never intended that a man should suffer both punishments for one conviction.

Regina v. Barton, 13 Q. B. 389, cited in Paley, 6th ed., p. 299, is authority for the proposition that where corporeal punishment is substituted for the penalty in the event of its non-payment, such punishment must not extend to the non-payment of costs, because it is not the method by which the penalty is "recoverable" within the meaning of sec. 18, 11 & 12 Vic. ch. 43.

In that case Wightman, J., said: "The stocks is a personal punishment substituted for the pecuniary penalty where that cannot be levied, not a means provided for recovering the penalty."

In the case before us there had been a warrant of distress, and a return of no sufficient distress, and nothing was levied.

The report of the *Trigerson Case* is from manuscript reports in Judge's Chambers, as appears from the frontis page, published in 1858. The decision was in the 5th Vic. 1842, and is necessarily, no doubt, very meagre. The pleadings are not set out. It would appear as if the defence considered was by some one other than the board, as witness the words: "Averred that he had made part of the sum directed to be levied." The statutes are not referred to, nor are any cases cited.

I think it would be unsafe to rely upon the case as reported as authority for the plaintiff's contention, especially where no other case prior or subsequent has been referred to by counsel to support the same proposition. Indeed had we the plea set out at length, the full statement of facts might confine the language used in the judgment within the limits assigned by the cases to which I have referred.

Judgment.

ROSE, J.

I come to the conclusion that the objection is not valid ; and that, therefore, with the conviction remaining in force, the action was not sustainable.

It is unnecessary to refer to the other grounds taken by Mr. Martin in support of the judgment.

The motion will be dismissed, with costs.

GALT, C.J., and MACMAHON, J., concurred.

[COMMON PLEAS DIVISION.]

REGINA V. FIFE.

Justice of the peace—Malicious injuries to property Act—R. S. C. ch. 168—Warrant of commitment—Omission of, “unlawfully”—Effect of—Omission of amount of damage.

Under sec. 58 of the Malicious Injuries to Property Act, R. S. C. ch. 168, the offence must be “unlawfully and maliciously” committed, and the damage must exceed twenty dollars.

In this case the warrant of commitment charged the offence as having been wilfully and maliciously committed, omitting the word “unlawfully.” *Held*, that this was fatal to the commitment and it was directed to be quashed.

Held, also, that the commitment should have alleged that the damage exceeded twenty dollars.

Statement.

THIS was a motion to make absolute an order *nisi* to quash a warrant of commitment made by two justices of the peace for the county of Peterborough, on the 6th of September, 1888, committing the defendant Robert Fife to gaol at Peterborough, to stand his trial at the then next ensuing Court of competent jurisdiction, for that “he did, on the night of the 27th of August last past, wilfully and maliciously burn down a fence, the property of the said Alexander Kemp.”

In Easter Sittings, May 20, 1889, *W. M. Douglas*, supported the order.

No one appeared to shew cause.

June 29, 1889. *MACMAHON, J.* :—

The commitment is for an offence under the Malicious Injuries to Property Act, R. S. C. ch. 168, and is intended to be under section 58 of that Act; and under that section the offence must have been “unlawfully and maliciously” committed. The commitment leaves out “unlawfully,” and charges the offence as having been “wilfully” and maliciously committed.

The objection to the commitment for want of the averment that the damage was “unlawfully” done is fatal :

Rea v. Ryan, 2 Moo. C. C. 15 ; *Charter v. Greame*, 13 Q. B. 216 ; *Rea v. Turner*, 1 Moo. C. C. 239. Judgment.

MACMAHON,
J.

And where a statute made it a felony "wilfully and maliciously" to do an act, an omission to charge the offence as having been "wilfully" done, was held bad, though it was stated to be done "unlawfully and maliciously": *Regina v. Davis*, 1 Leach C. C., 4th ed., 493 ; *Regina v. Bent*, 1 Den. C. C. 157 ; Archbold's Criminal Pleading, 19th ed., 65

Section 58 only authorizes the committal for trial for the misdemeanour when the damage or injury to the property is to an amount exceeding \$20 ; and it is objected that the warrant of commitment does not shew the amount of the damage or injury to the property destroyed.

It was held in *Regina v. Thoman*, 12 Cox 54, under the Imperial Act 24 & 25 Vic. ch. 97, sec. 51, which is the same as section 58 of our Act, that it was necessary to allege that the amount of damage or injury to the property exceeded five pounds. See also *Regina v. Williams*, 9 Cox 338, and *Charter v. Greame*, 13 Q. B. 216, at p. 236.

The rule must be absolute to quash the warrant of commitment, but without costs. There will be the usual order for protection to the justices and officers.

GALT, C.J., and ROSE, J., concurred.

[COMMON PLEAS DIVISION.]

BROWN V. McRAE.

Damages—Fire caused by defendant's negligence—Right to set off amount received from insurance company.

In an action by plaintiff to recover damages for the destruction of his dwelling house and a quantity of chattel property caused by sparks emitted from defendant's steam tug through defendant's negligence.

Held, that the defendant was not entitled to deduct from the amount of damages found to have been sustained by the plaintiff, an amount paid to the plaintiff by an insurance company under an insurance on the property.

Statement.

THIS was an action was to recover from the defendant the value of the plaintiff's dwelling-house, and a quantity of chattel property alleged to have been destroyed by fire, caused by sparks emitted by the steam tug "W. F. McRae," plying on the Chenal Ecartè, a navigable stream, and near to the plaintiff's dwelling-house, situate in the Gore of the township of Chatham.

The cause was tried before STREET, J., and a jury at Chatham, at the Spring Assizes of 1889.

At the trial the jury found the defendant was guilty of negligence in not having proper protection to the smoke stack, which caused sparks from the tug to escape and set fire to the house; and they valued the plaintiff's house at the time it was destroyed at \$500, and the value of the plaintiff's other property which was burned at \$20.

The plaintiff had been paid by the London Mutual Insurance Company, in which his property had been insured, \$250 for loss by destruction of his dwelling, and \$79 for loss on the chattels destroyed.

The learned Judge directed the jury that after ascertaining the loss sustained by the plaintiff by the destruction of his dwelling and other property, they could deduct therefrom the amount received by him from the insurance company, and the difference would be the sum which the plaintiff would be entitled to recover from the defendant if he was liable in the action.

In accordance with this direction the jury deducted the *Statement*. \$329 paid by the insurance company from the \$520 which they found to be the plaintiffs total loss, leaving the amount of \$191 : and the learned Judge ordered judgment to be entered for the plaintiff for the said sum \$191.

Notice of motion was given by the plaintiff to have the verdict increased to the amount of \$599.

In Easter Sitzings, 1889, *Meredith*, Q. C., supported the motion.

Osler, Q. C., and *M. Wilson*, contra.

June 29, 1889. MACMAHON, J. :—

The plaintiff's motion is to have the verdict increased to \$599, that is, \$500, the value of the dwelling ; \$79, the amount of other property admitted by the insurance company to have been burned, and the \$20 being the value of chattels found by the jury to have been destroyed.

The plaintiff claimed at the trial that the chattel property destroyed by the fire was of the value of \$180 or \$190, and evidence was given in support of this claim, which the jury appear to think was grossly exaggerated as they found the value to be only \$20, and our judgment must be based upon the findings of the jury, and upon these only.

The principles upon which all the subsequent decisions have been based, as to the amount the plaintiff is entitled to recover from a wrong-doer who has caused the destruction of his property, have been deduced from the case of *Mason v. Sainsbury*, 3 Doug. 61. There a party whose property had been burnt by a mob was allowed, after receiving the amount of his loss from an insurance office, to sue the hundred on the statute 1 Geo. I. ch. 5, for the benefit of the insurers.

In *Yates v. Whyte*, 4 Bing. N. C. 272, the plaintiff sued the defendants for damaging his ship by collision ; and it was held that the defendants could not deduct from the

Judgment. amount of damages to be paid by them the sum received
MACMAHON, by the plaintiff from the insurers in respect of such
J. damages. Tindal, C. J., said, at p. 283: "If the plaintiff cannot recover, the wrong-doer pays nothing and takes all the benefit of a policy of insurance." And Park, J., in his judgment referred to the decision in *Mason v. Sainsbury*, and said that it confirmed the general doctrine that the wrong-doer should be ultimately liable, notwithstanding a payment by the insurers.

In *Simpson v. Thompson*, 3 App. Cas. 279, Cairns, Lord Chancellor, in giving his opinion as one of the Law Peers, at pp. 285-6, quotes the judgments of Chief Justice Tindal, and Mr. Justice Park, in the case of *Yates v. Whyte* in full, and says that the questions involved in *Yates v. Whyte* were analogous to those being considered in the case he was then discussing, and were decisive of it.

Reference may also be had to *Darrell v. Tibbitts*, 5 Q. B. D. 560; *Castellain v. Preston*, 11 Q. B. D. 380, and *National Fire Ins. Co. v. McLaren*, 12 O. R. 682.

The plaintiff's motion must be made absolute to increase the judgment to the sum of \$520, with costs.

GALT, C. J., concurred.

ROSE, J., was not present at the argument, and took no part in the judgment.

[COMMON PLEAS DIVISION.]

REGINA V. FLORY.

*Taverns and shops—Closing shops—By-law for—Discrimination—Illegality
Distress—51 Vic. ch. 33 (O.)—37 Vic. ch. 73, sec. 2, sub-sec. 14, R.
S. O. ch. 184, sec. 421.*

A by-law passed by the town of A. under sec. 2, sub-sec 2 of the Ontario Shops Regulation Act, 51 Vic. ch. 33 (O.) provided, section 1, That all shops, &c., where goods were exposed or offered for sale by retail in the town, should be closed at 7 p.m. on each day of the week, excepting Saturday, from the 15th January to the 15th September, &c. Section 3 provided that it should not be deemed an infraction of the by-law for any shopkeeper or dealer to supply any article after 7 p.m., to mariners, owners, or others of steamboats or vessels calling or staying at the port of A.

Held, that the by-law was bad for that section 3 was illegal in discriminating between different classes of buyers, and different classes of tradesmen, and was in contravention of sub-sec. 9 of said sec. 2 of the Act.

A conviction of the defendant under the by-law was therefore quashed.

Held, also, that a provision for distress in default of payment of the fine and costs imposed, did not constitute a part of the penalty or punishment imposed by the by-law, but was merely a means of collecting the penalty as authorized by sec. 2, sub-sec. 14 of 39 Vic. ch. 33, (O.) and sec. 421 of the Municipal Act R. S. O. ch. 184.

THIS was an application to quash a conviction under by-Law Statement. law 106, of the town of Amherstburg, passed under "The Shops Regulation Act 1888," 51 Vic. ch. 33, sec. 2, (O.)

The following is a copy of the by-law :

"BY-LAW No. 106.

Passed 24th of April, 1888.

A by-law regulating the closing of Shops in the Town of Amherstburg :

"Whereas it is desirable that all shops in the town of Amherstburg, (excepting those shops and premises, mentioned in section 2 of this by-law), should be closed at the hour of seven of the clock in the afternoon of each day of the week, excepting Saturday, during the part of this year hereinafter mentioned.

"Therefore, the municipal council of the town of Amherstburg, enacts as follows :

"1. That all shops, booths, stalls, or places, where goods are exposed or offered for sale by retail, in the town of Amherstburg, shall be closed at the hour of seven of the clock in the afternoon on each day of the week, excepting Saturday, during that part of the year, from the fif-

Statement. tenth day of the month of January, to the fifteenth day of the month of September, in each year, during the continuance of this by-law.

"2. That this by-law shall not apply to any shop where the only business carried on is that of a tobacconist, news-agent, hotel, inn, tavern, victualling house or refreshment house, nor to any premises, wherein, under license, spirituous or fermented liquor is sold by retail for consumption on the premises.

"3. And provided that it shall not be deemed an infraction of this by-law, for any shop-keeper or dealer to supply any article after seven of the clock in the afternoon, to mariners, owners or others of steam-boats or vessels calling or staying at the Port of Amherstburg.

"4. Any person found guilty of an infraction of this by-law, upon conviction thereof before any justice of the peace having jurisdiction within the said corporation, shall be liable to a fine not exceeding \$20 with costs, and in default of payment of such fine and costs, to be imprisoned in the common gaol of the county of Essex, for a period not exceeding one month.

"This by-law shall take effect and come into force on the first day of May, 1888.

"J. TEMPLTON, *Clerk.*

"T. J. PARK, M. D., *Mayor.*"

The conviction was that the defendant

"Did refuse and omit to close his retail grocery shop, being," &c., "at and after the hour of seven of the clock in the afternoon, on the 12th day of July, 1888, contrary to a certain by-law of the municipality of the said town of Amherstburg, in the said county of Essex, passed on the 24th day of April, 1888, intituled 'A by-law regulating the closing of shops in the town of Amherstburg;' and we adjudge the said George J. Flory, for his said offences to forfeit and pay the sum of \$5 fine, to be applied according to law; and also to pay to George L. Middleton, the complainant, the sum of \$4.60, for his costs in that behalf; and if the several sums are not paid on or before the 22nd day of July, 1888, we order the same to be levied by distress and sale of the goods and chattels of the said George J. Flory; and in default of sufficient distress, we adjudge the said George J. Flory to be imprisoned in the common gaol," &c., for ten days, "unless the said several sums and all costs and charges of conveying" defendant to the goal, "be sooner paid."

The only grounds of the order *nisi* necessary to be mentioned, are the following:

"6. The said by-law was illegal and not in accordance with the statute, in not requiring shops to remain closed continuously after the hour fixed by the by-law; and, in permitting the supply of articles to mariners and vessels and vessel owners after that hour; and thereby illegally discriminating between different classes of buyers and different classes of tradesmen.

"7. In this said conviction the justices exceeded their jurisdiction in Statement ordering that the fine and costs thereby imposed might be levied by distress and sale of the goods and chattels of the defendant, as the by-law does not authorize distress, but only imprisonment in default of payment of the fine."

In Easter Sittings, May 21, 1889, *Aylesworth*, supported the motion, and referred to *Regina v. Pipe*, 1 O. R. 43; *Ostrom v. Corporation of Sidney*, 15 A. R. 43; *Regina v. Logan*, 16 O. R. 335.

Langton, contra, referred to *Re Cameron and Municipality of East Nissouri*, 13 U. C. R. 190; *Regina v. Swallowell*, 12 O. R. 391; *Fitch v. Walker*, 7 P. R. 8.

June 29, 1889. ROSE, J.:—

One objection was that the by-law was invalid in that it discriminated between classes. The clause complained of is sec. 3.

It provides: "That it shall not be deemed an infraction of this by-law for any shop-keeper or dealer to supply any article after seven of the clock in the afternoon to mariners, owners or others of steamboats or vessels calling or staying at the port of Amherstburg."

The statute, section 2, sub-sec. 2, provides for passing a by-law, requiring "all or any class or classes of shops" to be "and remain closed on each or any day of the week at and continuously after the time and hour fixed or appointed in that behalf by the by-law."

By the interpretation clause of the section, sub-section 1, "closed" means "not open for the serving of any customer;" and contains a proviso not affecting this case.

Sub-sec. 9 requires that "a shop in which trades of two or more classes are carried on, shall be closed for the purpose of all such trades at the hour at which it is, by any such by-law, required to be closed for the purpose of that one of such trades as is the principal trade carried on in said shop."

Sub-secs. 10 and 11 provide for certain exceptions, but do not affect this question.

Judgment.

ROSE, J.

I see nothing to warrant the passing of the 3rd section of the by-law which is open, I think, to the objection taken, and is in contravention of the provisions of sub-sec. 9 of the statute.

Sub-sec. 11 has been amended by sec. 3 of 52 Vic. ch. 44, (O.), by which Act this and other by-laws have been amended; but this cannot affect the case before us, for the alleged offence was committed, and the conviction made in June, 1888, and the Act was passed in March, 1889.

This was said to be in effect of a motion to quash the by-law, and costs were asked. As the order *nisi* was granted in December last, the objection was not then covered by the amending Act, whatever may be its effect now; but if the effect of sec. 3 of 52 Vic. ch. 44, is to amend the by-law, so as to remove the objection, then when the motion was argued before us on the 21st of May last past, we could not have quashed the by-law on that objection.

The objection that the by-law was to come into force in less than one week from its passing, even if sustainable on the evidence, is so purely technical that the defendant should not have any advantage from it if the merits are not with him.

I am inclined to think that Mr. Langton made sufficient answer to the objection as to illegality in providing for distress by reference to sec. 2, sub-sec. 14 of 37 Vic. ch. 33, and sec. 421 of the Municipal Act, R. S. O. ch. 184,

The provision as to distress in the conviction is not, in my judgment, "part of the penalty or punishment imposed by the by-law," but merely a means for collecting the penalty, and so, I think, sec. 421 justifies the magistrates in ordering collection by distress.

The merits appear to be entirely against the defendant. The object of the Act is plain, and it is apparent that the defendant determinately put himself in opposition to the Act and the by-law and the wishes of the people. That he has succeeded in being relieved from the conviction, is not owing to any favourable view to be taken of his conduct, but to technical objections to which we have felt compelled to yield.

I think that while the conviction must be quashed, the order should be without costs and provide for the protection of the justices and others.

Judgment.
ROSE, J.

GALT, C. J., and MACMAHON, J., concurred.

[COMMON PLEAS DIVISION.]

MARKS V. THE CORPORATION OF THE TOWN OF WINDSOR.

Jury—Dispensing with, after evidence taken.

The Judge at the trial of an action has the power to dispense with the jury after all the evidence has been taken, but the power should be sparingly exercised.

THIS was an action tried before FALCONBRIDGE, J., and a jury, at Sandwich, at the Spring Assizes of 1889.

The plaintiff's claim was for damages arising from closing up what was called a water-course or drain, crossing the highway north of the premises of the plaintiff, and running to the river.

The learned Judge, practically after all the evidence was in, dispensed with the jury, and entered judgment for the defendant. The counsel for the plaintiff objected, but on the objection being overruled, did not withdraw from the case.

Notice of motion was given by the plaintiff to set aside the judgment on the ground, amongst others, that the learned Judge had no power at that stage of the case to dispense with the jury.

In Easter Sittings, May 21, 1889, *Aytoun-Finlay* supported the motion. There is clearly no power to dispense with the jury after all the evidence has been taken : *Bordier v. Burrell*, 5 Ch. D. 512, 514 ; *Clarke v. Cookson*, 2 Ch. D. 746 ; *Re Martin*, 20 Ch. D. 365, 369, 371-4 ; *Denmark v. McConaghy*, 29 C. P. 563 ; *Widder v. Buffalo and Lake Huron R. W. Co.*, 24 U. C. R. 520, 523.

Argument.

W. R. Meredith, Q. C., contra. The plaintiff has waived his right to object to the dispensing with the jury by his counsel going on with the case after the jury had been dispensed with. There is, however, the right to dispense with the jury at any time: *Denmark v. McConaghy*, 29 C. P. 563.

June 29, 1889. ROSE, J.:—

My learned brother dispensed with the jury, practically after the evidence was all in. This is complained of.

There was I think the power to do so: See *Brown v. Wood*, 12 P. R. 198. The exercise of the power given by statute at the trial is within the discretion of the trial Judge, and I cannot see on principle the difference as to the right to act whether the order is made before, during, or after the giving of evidence so long as the case has not been submitted to the jury. I do not say how it would be in such a case. To hold otherwise would be to say that the power might not be exercised after say one witness had given evidence, although it might not appear until then that the case was one which could not conveniently be tried by a jury.

It seems to me it is a power which, after the evidence is once in, should be sparingly exercised; and, if the Court upon an application for a new trial felt in doubt as to the correctness of the result, the making of such an order might possibly have its effect in turning the scale.

Although the reason for making the order does not very clearly appear upon the notes of evidence, I am quite confident my learned brother deemed it to be in the interest of justice; and, as I agree with him as to the correctness of the result arrived at, I think this objection must fall with the others taken.

The motion must be dismissed, with costs,

GALT, C. J., and MACMAHON, J., concurred.

[COMMON PLEAS DIVISION.]

GOOSE v. THE GRAND TRUNK RAILWAY COMPANY.

New trial—Omission to swear juror.

The Court will not grant a new trial because one of the jurors has not been sworn, where no injustice is done thereby.

THIS was an action brought by the plaintiff as admin-Statement.
istrator of the estate of his wife, who was killed by an
accident on the railway of the defendants at the Chatham
station.

The case was tried before STREET, J., and a jury, at
Chatham, at the Spring Assizes of 1889.

At the close of the case the learned Judge submitted the
following questions to the jury :

1. Might the deceased Mrs. Goose by the exercise of
ordinary care have avoided the accident? Yes.

2. [The second question had reference to the amount of
damages].

3. Were the defendants guilty of negligence in any
other respect than in the rate of speed at which they were
running? Yes.

4. If so, in what did such negligence consist? A. Not
having sufficiently guarded at crossing.

Upon these findings the learned Judge gave judgment
dismissing the plaintiff's action with costs.

Notice of motion to the Divisional Court was given by
the plaintiff for a new trial, on the ground that the verdict
was contrary to law and evidence, and also on the ground
that one of the jurors was not sworn.

During Easter Sittings, June 6, 1889, *Douglas Q.C.* sup-
ported the motion and referred to *Radley v. London and*
North Western R. W. Co., 1 App. Cas. 754; *Smith on Neg-*
ligence, 227, 231, 234.

Osler Q.C., contra, referred to *Thompson and Merriam on*
Juries, sec. 275.

Judgment. June 29, 1889. GALT C. J.:—

GALT, C.J.

There can be no doubt that the verdict of the jury is in accordance with the evidence as respects want of care on the part of the deceased. She walked directly in front of the engine. The slightest degree of caution on her part would have prevented the accident. We have had occasion lately to consider several cases on this subject, and when it appears that the injury has arisen from want of ordinary care on the part of the plaintiff the action fails.

Then as respects the affidavit of the jurymen that he was not sworn. It is singular that such a question has not, so far as I can find, been before any court. It has been held, and may now be considered as settled, that it is discretionary in the Court to grant a new trial where a jurymen has been sworn by a wrong name. In the absence of authority I think no effect should be given to such a statement made after the trial.

To grant a new trial on affidavit of a juror that he was not sworn, more particularly when he appears to be dissatisfied with the result of his verdict, would be productive of most serious results, and would tend to destroy trial by jury, for there would be nothing to prevent a juror after sitting on a jury to come forward and swear he was not sworn because the usher of the court did not hand him the bible or that through forgetfulness he had omitted to "kiss the book."

The motion must be dismissed.

ROSE J.:—

It was manifest at the close of the argument that we could not interfere with the verdict on any ground founded upon the evidence.

It was also clear that, so far as the motion was founded on the affidavit of a juror as to what took place in the jury-room, we could not entertain it, and that the affidavit should be removed from the files.

This question was formally considered and determined by this Court in *United States Express Company v. Donohoe*, 14 O. R. 333, where many cases were cited. I followed that case in *Farquhar v. Robertson* (a).

Judgment.

ROSEN, J.

I may also refer to Archbold's C. L. Pr., 14th ed., pp. 733, 737; Bacon's Abr., vol. 7, pp. 782-3; and Fisher Dig. vol. 5, p. 1955.

It is, however, necessary to consider the objection that one of the jurors was not sworn.

As pointed out by the learned Chief Justice there is no Reported decision on the question. I have looked carefully through many books and have found only the following in Hale's History of the Pleas of the Crown, vol. 2, p. [296]: "If only eleven be sworn by mistake, no verdict can be taken of the eleven, and if it be, it is error; and so in a presentment; but if twelve be recorded sworn, no averment lies that one was unsworn."

This quotation apparently was taken from Lamb's Justice, 395—a work not in our libraries, and I am therefore unable to trace the history farther.

Several cases are reported where the question was considered as to a juror being sworn by the wrong name—or a juror answering by mistake to the name of another—or one being sworn not being on the panel. These may be found in Bacon's Abr., vol. 4, pp. 575 6; vol. 7, pp. 770-1; Archbold's C. L. Pr. 14 ed. pp. 732-3; Fisher Dig. vol. 5, p. 1958; Rob. and Jos. Dig. p. 2579.

In Bacon's Abr., vol. 7, pp. 770-71, it may be seen that in the case of *Wrey v. Thorn*, Barnes 454, the Court held that: "As the record and jury process are right, an affidavit ought not to be received to contradict them;" but in *Norman v. Beaumont*, Barnes 453, upon its being urged that the Court would not receive an affidavit to contradict the record, it was held that the Court was not concluded by the record.

The fact in the first case was that a person whose name was Harry was returned and sworn upon the jury by the name of Henry.

(a) Since reported, 13 P. R. 156.

Judgment.

ROSE, J.

The Court said: "This was the person who was returned and intended to be on the jury, and it is commonly understood that Henry and Harry are the same name."

In the second case one Richard Sheppard was returned to serve as a juror on the crown side and being in the *nisi prius* Court when Richard Gratter returned upon the *nisi prius* panel was called, he answered and was sworn upon the jury in the room of Gratter.

By the Court: "The Court are not, in this case, concluded by the record. The twelve jurors who try a cause are, by the 3 Geo. II., to be drawn out of a box, and, consequently, as this man's name never was in the box, the cause has not been tried."

It was decided in *Wells v. Cooper*, 50 L. T. 721, that it is in the discretion of the Court to grant a new trial where a person not impannelled has served upon the jury, and that the County Court will not grant such new trial unless substantial injustice has been done by a wrong juror having served.

I agree to what the learned Chief Justice has said as to the danger of entertaining an application for a new trial upon such a ground. Counsel, or the attending solicitor, may well be required to keep watch upon the regularity of the proceedings; and, if through carelessness or oversight, error or mistake creep in, he who by watchfulness might have prevented it ought not to be allowed to take advantage of such error or mistake where no substantial or, as in this case, no injustice has, so far as appears, been the result. See also *Ham v. Lasher*, reported in note to *Widder v. Buffalo and Lake Huron R. W. Co.*, 24 U. C. R. 520, at p. 533: Also *Shipman v. Bermingham*, 5 O. S. 442; *Richardson v. Canada West Farmers Ins. Co.*, 17 C. P. 342, for reference to which I am indebted to the learned Chief Justice of Ontario.

In this last case is cited *Williams v. Great Western R. W. Co.*, 3 H. & N. 869, where Pollock, C. B., said, at p. 870: "Generally speaking, where there is ground of challenge, but no objection is taken to a juror who

might be challenged, that is certainly no reason for granting a new trial. We cannot say that there are no circumstances which would induce the Court to interfere. For instance, if there had been any arrangement to procure a shareholder to be on a jury for the purpose of influencing the other jurymen, or if there had been any collusion the Court might interfere."

Judgment.

ROSE, J.

For the purpose of my judgment I have assumed the fact to be as stated in the juror's affidavit.

The motion should be dismissed with costs.

[COMMON PLEAS DIVISION.]

REGINA V. GOOD.

Indian lands—Removing hay from—What constitutes "hay"—Right to include costs of commitment and conveying to jail in conviction—Indian Act, R. S. C. ch. 43, sec. 26

The defendant was convicted for removing hay from Indian lands contrary to sec. 26 of the Indian Act, R. S. C. ch. 43.

Held, that the word "hay" used in the statute does not necessarily mean hay from natural grass only, but what is commonly known as hay, namely, either from natural grass or grass sown and cultivated.

Held, also, that under this Act and the legislation incorporated therewith, there is no power to include in the conviction the costs of commitment and conveying to jail.

THIS was an application to quash a conviction made under sec. 26 of the Indian Act, R. S. C. ch. 43, for removing hay from Indian land in the township of Tuscarora, an Indian reserve, without the leave required by that section.

The defendant was a white man, who had married an Indian woman, and was living on the reserve.

The grounds, amongst others, taken in the order nisi, were, that it had not been proved that the removal was of natural hay: that the costs of commitment and conveying to gaol were improperly included in the conviction; and that the magistrate had no jurisdiction in the township of Tuscarora under his commission.

Argument. In Easter Sittings, 1889, *V. Mackenzie*, Q.C., supported the order. The word "hay" in the section must be construed to mean natural hay, that is, hay grown without the intervention of the husbandman. The hay in question had been sown by the defendant, and for the attempt to reap it he was convicted. If the interpretation given to the section by the magistrate is sustained, every Indian will be precluded from obtaining the result of his own industry unless he procure a license. This certainly never was the intention of Parliament. Then as to the costs, section 26 does not provide for any costs being imposed beyond the costs of prosecution: *Regina v. Wright*, 14 O. R. 668; *McLellan v. McKinnon*, 1 O. R. 219; *Trigerson v. Board of Police of Cobourg*, 6 O.S. 405. Then as to the jurisdiction. The magistrate's patent does not include the township of Tuscarora, for it was only to embrace territory subject to the Canada Temperance Act, and the Tuscarora reserve is not subject to that Act, but to the liquor clauses of the Indian Act.

Aylesworth contra. The word "hay" is used in the statute in its popular sense, and therefore includes the hay in question. As to the costs of commitment &c. The use of the word "prosecution" includes the costs of any proceeding which the magistrate was authorized to take. But even if these costs were not included the defendant is made subject to a less onerous imprisonment by the section than if they were included, there being power given to apportion the period of imprisonment on part payment of the penalty. As to the jurisdiction of the magistrate, it should have been negatived that the magistrate had not another commission which would give him jurisdiction: *Regina v. Richardson*, 8 O. R. 651.

June 29th, 1889. ROSE, J. :—

The first objection was that the plant in question should have been proved to have been natural grass.

The statute says "hay." The conviction uses the same

word. "Hay" is not an appropriate word to designate grass before it is cut. It is defined to be "grass cut and dried for fodder; grass prepared for preservation." "Grass" is defined to be "In common usage 'herbage,' the plants which constitute the food of cattle and other beasts." As sometimes, perhaps commonly, used, hay signifies what may be called natural grass, timothy, and clover while growing, or ripe for the harvest, and still uncut.

Judgment.

ROSEN, J.

We cannot say that the "hay" mentioned in the statute did not include what is commonly known as hay. Acting on our common knowledge we should say it did. Therefore it includes both natural grass, and grass sown and cultivated.

It was a fact for the magistrate, and we see no ground for drawing the distinction suggested or interfering with his finding.

The second objection was, that the conviction provides for imprisonment "unless * * all costs and charges of the * * commitment and conveying * * to the gaol shall be sooner paid."

The statute provides for a penalty of \$20, "and the costs of prosecution in each case." Provision is made for distress—or imprisonment, "in default of immediate payment;" and in case of distress, if upon the return of the warrant "the amount thereof has not been made, or if any part of it remains unpaid," committal may be directed.

The conviction contains an adjudication of punishment, viz., a fine of \$20; costs \$12.50; directs, in case of non-payment forthwith, distress; and in default of sufficient distress imprisonment, "unless," &c.

It was argued that "costs of prosecution" included costs of commitment. I think this is not so. See *McLellan v. McKinnon*, 1 O. R., at p. 231.

The distress is "to levy the amount of the *said* penalties and costs." The costs referred to are the costs of prosecution. The further provision in the statute is: "If upon the return of any warrant for distress and sale, *the amount thereof* has not been made," then imprisonment.

Judgment.

ROSE, J.

The section has not any words providing for release upon payment of the fine and costs ; and so we have to read in sec. 98 of the Summary Convictions Act, R. S. C. ch. 178. The provisions of this Act are made applicable by sec. 3, of ch. 178. Of course the provisions in any special Act, if in conflict with the provisions of the general Act, would, no doubt, govern ; but here no such question arises.

Section 98 provides: "Whenever any person is imprisoned for non-payment of any penalty or other sum, he may pay or cause to be paid to the keeper of the prison in which he is imprisoned, the sum in the warrant of commitment mentioned, together with amount of the costs and charges and expenses therein also mentioned, and the keeper shall receive the same, and shall thereupon discharge the person, if he be in custody for no other matter." As to this section : see *Arnott v. Bradley*, 23 C. P. 1 ; *Regina v. Henderson*, 12 O. R. 178.

The commitment would, if it followed the conviction, mention the costs and charges of the commitment and conveying to gaol, and unless these were lawful charges the prisoner would have to remain in custody, or pay them.

I think nothing in the section authorizes the provision in the conviction complained of, and that the conviction cannot stand. See *Regina v. Wright*, 14 O. R. 668.

The third objection as to the territorial jurisdiction of the magistrate, fails, as no evidence is before us to enable us to determine under what patent he assumed to act : *Regina v. Richardson*, 8 O. R. 651.

The fourth objection is not tenable as the evidence shews removal beyond the reserve.

The conviction will be quashed without costs, and with the usual order for protection.

GALT, C. J., and MACMAHON, J., concurred.

COMMON PLEAS DIVISION.

REGINA V. RICHARDSON.

REGINA V. ADDISON.

Recognizance—Absence of affidavit of justification—Sufficiency—R. S. C. ch. 178, sec. 90.

By sec. 90 of R. S. C. ch. 178, and the rule of Court thereunder, no motion to quash any conviction brought before any Court by *certiorari* shall be entertained unless the defendant is shewn to have entered into a recognizance with one or more sufficient sureties.

Held, that the sufficiency of the suretyship is not shewn by the mere production of the recognizance, but there must be evidence on which the Court can say they were sufficient sureties.

Where therefore there was no affidavit of justification to the recognizance it was held not to comply with the statute.

THIS was a motion by *Mackenzie*, Q. C., for an order Statement.
nisi to quash two several convictions for selling liquor contrary to the second part of the Canada Temperance Act. The recognizance in each case put in was executed by the defendant in each case, the surety being the defendant in the other case. There were no affidavits of justification

Objection was taken by the Court to the recognizances.

June 29th, 1889. ROSE, J.:—

The recognizances in these cases have been executed by the defendants—that is, in the Richardson case he and Addison join, and in the Addison case Richardson appears as surety. There is no affidavit of justification.

The statute, R. S. C., ch. 178, sec. 90, and the rule of Court thereunder provides, “that no motion to quash any conviction . . . brought before any Court by *certiorari* shall be entertained unless the defendant is shown to have entered into a recognizance with one or more sufficient sureties . . .”

Judgment.

ROSE, J.

The sufficiency of the suretyship is not shown by the mere production of the recognizance. The Court must have some evidence upon which it can say that there were sufficient sureties. The absence of the affidavit of justification prevents our determining that the recognizances are such as the statute and rules require, and so we cannot entertain the motions.

Orders *nisi* refused.

GALT, C. J., and MACMAHON, J., concurred.

[CHANCERY DIVISION].

O'SULLIVAN V. PHELAN ET AL.

Will—Devise—Condition in restraint of sale—Restricted to name and family of testator.

A testator by his will devised certain real estate to two of his nephews subject to the following condition: "But neither of my said nephews is to be at liberty to sell his half of the said property to any one except to persons of the name of O'S., in my own family; this condition is to attach to every purchaser of the said property."

Held, that the condition was valid.

Re Watson and Woods, 14 O. R. 48 distinguished.

THIS was an action brought for the construction of a condition in the will of one Daniel Tim-Daniel O'Sullivan.

The plaintiff was the widow and administratrix of Thomas O'Sullivan, one of the devisees under the will, and the defendants were the other devisee Michael O'Sullivan and his sister Ellen, and the infant children of Thomas O'Sullivan.

There was only one person of the testator's name and family to whom the devisee nephews could sell as required by the will, and he resided in Detroit, Michigan.

The condition is set out in the judgment.

The matter came up by way of motion for judgment and was argued in May 29, 1889, before ROBERTSON J.

Anglin, for the plaintiff. The two nephews, the devisees, Argument. agreed to divide and made mutual conveyances; then they gave a part to their sister, so Michael and Ellen (the sister) were made parties, as the construction of the will affected their title: no relief is asked against them and they decline to appear. Thomas, the husband of the plaintiff, left debts when he died and his administratrix has no means of paying them except out of his share of the property. If the condition is valid it prevents her mortgaging as well as selling. The condition is void as the restraint is in perpetuity and is applied to all subsequent purchasers: and because there is only one individual capable of purchasing under the condition, and so void *in toto*. If sale is restricted to one individual the condition is invalid. The widow and children are not technically "purchasers" in this case. I refer to *Re Macleay*, L. R. 20 Eq. 186; *Atwater v. Atwater* 18 Beav. at p. 336; *In re Rosher*, *Rosher v. Rosher*, 26 Ch. D. 801; *In re Dugdale*, *Dugdale v. Dugdale*, 38 Ch. D. 176; *Heddlstone v. Heddlstone*, 15 O. R. 280, *Re Watson and Woods*, 14 O. R. 48; *Gallinger v. Farlinger*, 6 C. P. 572; *Bergin v. Sisters of St. Joseph*, 22 U. C. R. 204.

Moss, Q.C., for the infants. The infants are in the same interest as their mother the plaintiff, as she only holds as administratrix for dower, debts, and the children. The adverse interest, if any, is in Michael and Ellen, and they do not appear. The restraint extends to every purchaser, and that is repugnant to the previous devise in fee. There is no devise over on breach of condition. The condition is void. Thomas has not conveyed, but on his death the property went to his heirs, and if the condition as to subsequent purchasers is struck out the heirs could sell. The restraint on the two nephews might be good, but that is now over and the other is unreasonable. The restraint here goes further even than that in *Re Macleay*, *supra*, and that case has been dissented from in *Re Rosher*, *Rosher v. Rosher*, *supra*, and MacMahon, J., says in *Heddlstone v. Heddlstone*, *supra*, that the judgment in the *Macleay* case is somewhat misleading.

Argument. *Anglin*, in reply: If the condition is void in part, it is void in *toto* as it is not severable.

September 4, 1889. ROBERTSON, J.

An action brought to get the construction of the will of the late Daniel Tim-Daniel O'Sullivan, dated 20th November, 1880.

The plaintiff is the widow and administratrix of the late Thomas O'Sullivan, deceased, who died intestate since the testator, leaving him surviving his widow, the plaintiff, and the infant children of the ages of six and four years respectively. Thomas O'Sullivan was a nephew of the testator and one of his devisees of certain real estate.

The will in question, as regards the said real estate, is as follows: "I give, devise, and bequeath my farm of fifty-three acres, in the said township of York, and being the north half of the north half of Lot number three in the second concession from the bay, and also my village property, being lot number four in the first concession from the bay in the village of Norway, being about seven acres, both in the said township and county of York, to my nephews Thomas and Michael O'Sullivan, sons of Ann O'Sullivan of L'Amaroux, widow of Patrick O'Sullivan, deceased, my brother, their heirs and assigns forever, to be held by them as tenants in common, after they have made a division of said property to their mutual satisfaction. After such division, each of my said nephews is to hold his own half for himself and his heirs, *but neither of my said nephews is to be at liberty to sell his half of the said property to any one, except to persons of the name of O'Sullivan in my own family; this condition is to attach to every purchaser of the said property.* In case either of my said nephews die without issue or without making a will, then his share of the said property is to go to the survivor. In case both of my said nephews die without issue or without disposing of their one half as aforesaid by will or otherwise, then his or their share is to go to the children of my

brother Jeremiah O'Sullivan, now of near Detroit in the State of Michigan, one of the United States of America." Judgment.
ROBERTSON, J.

It is contended that the condition expressed in the words, "but neither of my said nephews is to be at liberty to sell his half of the said property to any one, except to persons of the name of O'Sullivan in my own family," is void for the reason that it is in restraint of alienation. The case was only argued by those who are interested in this contention, and I have not the advantage therefore of having heard an argument on the other side.

I had occasion to consider this question, and did so very fully in *Re Watson and Woods*, 14 O. R. 48, and there I held that the condition was absolutely void; but that is a very different case from the one now under consideration; there the words were "That he never will or shall make away with it by any means, but keep it for his heirs." Here the restraint is only as to the sale of the property. The devisee could not sell to any one except to a person or persons by the name of O'Sullivan of the testator's family, but there is nothing to prevent him disposing of it in any other way, by gift, devise, or otherwise, except by sale—he could mortgage it—so that all power of alienation is not taken away, and therefore, as Sir George Jessel said in *Re Macleay*, L. R. 20 Eq. at p. 188; "so that according to *Littleton*, the test is, does it take away all power of alienation?" Clearly in this case it does not. See also *Smith v. Faught*, 45 U. C. R. 484 at p. 488, per Hagarty, C. J.; and *Re Winstanley*, 6 O. R. 315. I am of opinion therefore that the condition is valid. As to costs, I make no order except as to those of the infants, which must be paid by the plaintiff.

G. A. B.

[CHANCERY DIVISION.]

WILLIAMSON ET AL. V. WILLIAMSON.

Will—Absence of subscribing witnesses—Want of proof of their existence or handwriting—Action to establish will.

In an action to establish a will in the handwriting of the testator, purporting to be executed in the presence of two subscribing witnesses, who could not be found and whose handwriting could not be proved, and probate whereof had been refused by the proper Surrogate Court, a motion for judgment asking to have the will established and probate thereof granted, notwithstanding that all parties interested consented, was dismissed and the application refused, on the ground that sufficient evidence had not been produced to show that such will was the will of the testator under R. S. O. ch. 109, sec. 12.

Statement.

THIS was an action brought to establish a will under the circumstances set out in the judgment.

Motion for judgment was made on September, 4th, 1889, before ROBERTSON, J.

Millican, for the plaintiffs. The pleadings admit that the will is in the handwriting of the testator, and he told his son that he was taking it to have it executed, and afterwards that he had done so. On his death bed he said both witnesses had passed away. The will bears the names of two subscribing witnesses who cannot be found, but two men of the same names have died since the date of the will. Their handwriting cannot be proved. The Surrogate Judge has refused probate for insufficient proof of execution. [ROBERTSON, J.—Are you appealing against that decision?] No. There was no contestant there and no security could be given. [ROBERTSON, J.—Can you come here from that Court of competent jurisdiction except by way of appeal?] Yes; *Wilson v. Wilson*, 24 Gr. 377, and *Perrin v. Perrin*, 19 Gr. 259, shew that the Surrogate Court cannot divest the High Court of jurisdiction; and the Surrogate Judge has only decided that the will has not been properly proved as yet. The plaintiffs have the right to bring this action: *Dickson v. Monteith*, 14 O. R.

719. All they ask is a declaration establishing the will which is not any authority that the will is properly proved. Argument.

Weir appeared for the defendant and asked that the judgment be granted as prayed by the plaintiffs.

September 5th, 1889. ROBERTSON, J.:—

Action brought by the widow of the late Robert Williamson, who died on or about 21st October, 1888, and seven of his children, against Walter Williamson, a son of the deceased—the said seven children and the defendant, being the only children and only surviving heirs and heiresses-at-law and next of kin of the said deceased—to establish a will, alleged to be made by the deceased, bearing date 20th March, 1883.

The paper writing set out in the pleadings, purports to have been signed by the deceased in the presence of “William McKenzie,” and “John Smith,” and on the face of it is in due form, but no evidence is offered, nor can any be offered: it is said, of the due attestation by these witnesses.

An application was made in the ordinary form to the Surrogate Court for probate, but no evidence of the due execution was or could be offered before that Court, although two affidavits were filed as to the execution being in the hand writing of the deceased, but the subscribing witnesses could not be found. Nor was, or could any evidence be adduced as to their respective signatures, it being alleged that two persons of the same names had formerly lived in the county of Wellington where the deceased had formerly resided, and with whom he was acquainted, had lately died; but there was nothing to shew that even these two persons were the subscribing witnesses. The Surrogate therefore refused probate, on the ground of the want of proof of execution.

It is said that all the parties are before the Court, and that these parties constitute the whole body of persons who would be, or are interested in the estate, as if the

Judgment. deceased had died intestate; but the disposition of the
ROBERTSON, J. estate under the alleged will, is not the same as it would be under the Devolution of Estates Act; the defendant Walter Williamson, under the alleged will, being entitled after his mother's death, to a much larger portion than any of the other children.

Then we have this somewhat remarkable state of affairs, all the parties said to be interested, except Walter, are plaintiffs; they ask the Court for a declaration establishing the will, and for a decree granting probate with execution thereof to the executors, who, I should have before stated, are the plaintiff Catharine, the widow, and the said Walter.

Walter in his answer admits all the allegations contained in the plaintiffs' statement of claim, and assents to judgment being given as asked.

After due consideration I have come to the conclusion that this cannot be done; there is no precedent cited for such a declaration, under the circumstances of this case; nor do I think any can be found. No evidence whatever is offered to satisfy the conscience of the Court that this document is really and truly the last will and testament of the deceased.

The Wills Act of Ontario, R. S. O. ch. 109, sec. 12, subsec. 1, declares: "No will shall be valid unless it is in writing, and executed in manner hereinafter mentioned, that is to say: it shall be signed at the foot or end thereof by the testator, or * * ; and such signature shall be made or acknowledged by the testator, in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator," &c.

How, therefore, can the Court declare that this paper writing is established to be the will of the late Robert Williamson? The fact is, it has not been, and admittedly it cannot be, so established; besides all this, there is if I am to assume that this action has been brought in perfect good faith by all these plaintiffs, they well knowing and

understanding their rights in the premises, no necessity for Judgment. any such proceeding as this. If the parties now before the ROBERTSON, J. Court are desirous of carrying out what they allege was the intention of their deceased father, they all being of full age, can carry out that intention by mutual agreement, and letters of administration can be granted, as doubtless they would be on a proper application to the Surrogate Court, the deceased having died intestate, it being impossible to prove the will. All parties concerned joining in such an application, it appears to me, would remove all difficulties. I therefore am obliged to refuse the declaration asked for, but I make no order as to costs.

G. A. B.

Statement.

[COMMON PLEAS DIVISION.]

REGINA V. COPP.

Municipal corporations—Internal walls of buildings—Right to prescribe the thickness, &c., of—Party walls—What constitutes.

The 10th sub-sec. of sec. 496 of the Municipal Act, R. S. O. ch. 184, as regards walls of existing buildings, only applies to external walls thereof and not to internal walls, and therefore municipal councils have no power to prescribe of what materials or of what thickness such internal walls should be. Sub-sec. 18 relating to party walls does not apply to internal walls separating buildings belonging to the same owner, for to constitute party walls they should separate the adjoining properties of different owners.

Where, therefore, a by-law was passed by the corporation of the city of H. prescribing the materials and thickness of the internal walls of every building, which, therefore, included existing buildings, and the defendant was convicted thereunder, by reason of, in the course of dividing a building erected before the passing of the by-law, and owned by him, into three separate shops, making the dividing walls of less thickness than that prescribed by the by-law, the by-law was held bad, and a conviction made thereunder was quashed.

The defendant was convicted on the 8th day of April, 1889, by the Police Magistrate of the city of Hamilton, for that he did divide into three stores or tenements by brick partition walls less than nine inches in thickness, a building within the fire limits of the said city of Hamilton, the partition walls of said building so erected by the said Anthony Copp between the said stores or tenements being only four (nine) inches thick in the first storey of the buildings, and less than three inches thick in the second and third storeys thereof, contrary to a certain by-law of the municipality of the said city of Hamilton, passed on the 13th December, 1886, and entitled "a by-law for preventing fires and for regulating the erection of buildings, and defining the fire limits in the city of Hamilton."

The defendant was the owner of a brick building three storeys in height, having the walls of ample thickness to satisfy the requirements of the by-law in that respect. He desired to convert the said building into three shops or stores, and for such purpose built the dividing walls between the several stores which were of brick nine inches

thick for the first storey (not four inches as stated in the **Statement.** conviction) and somewhat less than three inches thick in the second and third storeys.

In Easter Sittings 1889, *Aylesworth*, upon the return of the *certiorari* with the information, evidence and conviction annexed, obtained an order *nisi* to quash the conviction upon the following grounds:

1. Neither the evidence nor the conviction disclose any offence inasmuch as the building in which the partition walls in question were being placed was not a new building then being erected, but was an old building already completed, within which merely certain alterations were being made.

2. The said building was one which had been built before the by-law under which the said conviction is made was passed.

3. The municipal council of the said city of Hamilton had no power or authority to pass a by-law prohibiting the erection of partition walls in existing buildings in the said city, unless such partition walls were of a specified thickness, nor regulating the repairing or alteration of partition walls in such buildings; and the by-law under which the said conviction is made is in respect of the provisions above indicated, one which the said corporation had no jurisdiction to pass.

During the same sittings, June 4, 1889, *Aylesworth* supported the motion, and referred to *Regina v. Howard*, 4 O. R. 377; *Walker v. McMillan*, 6 S. C. R. 241.

Mackelcan, Q. C., contra, referred to *Welch v. Hotchkiss*, 12 Am. Rep. 383; *Dillon on Municipal Corporations*, 3rd. ed., secs. 141-3, 405.

June 29, 1889. MACMAHON, J.:—

By 47 Vic. ch. 32, sec. 16, (O.) R. S. O. ch. 184, sec. 496, (1887), sub-sec. 10, the council of every city, town, and incorporated village may pass by-laws * * "For

Judgment. regulating the erection of buildings and preventing the
MACMAHON, erection of wooden buildings, or additions thereto * *
J. in specified parts of the city, town, or village; and also
 for prohibiting the erection or placing of buildings, other
 than with main walls of brick, iron, or stone, and roofing of
 incombustible material within defined areas of the city,
 town, or village; [and for regulating the repairing or
 alteration of roofs or external walls of existing buildings
 within the said areas, so that the said buildings may be
 made more nearly fire-proof]; and for authorizing the
 pulling down or removal, at the expense of the owner
 thereof, of any building or erection which may be con-
 structed, repaired or placed in contravention of any by-law."

The amendment made to the then existing law by the
 47 Vic. ch. 32, sec. 16, is included within brackets in the
 above section, and was made after the decision in *Regina v.*
Howard, 4 O. R. 377, relating to the re-shingling of exist-
 ing buildings as required by a then existing by-law of
 the city of Hamilton.

The eighth clause of the by-law under which the defen-
 dant was convicted, provides that "Every building or
 part of a building, made, constructed, or placed within the
 said fire limits, shall be built of iron, stone, or brick * *
 and when such building or part of a building is built of
 stone or brick * * and when three storeys high,
 the outer wall of the first and second storeys shall be not
 less than twelve inches in thickness, and of the third story
 not less than nine inches in thickness * * and every
 building between the basement and top storey thereof which
 is to be divided into two or more stores, tenements, or
 dwellings, shall be so divided by brick or stone partition
 walls running from the front to the rear of such building
 of not less than nine inches in thickness, unless the build-
 ing is more than three storeys in height, in which case the
 partition walls up to and inclusive of the third storey, shall
 be not less than twelve inches in thickness," &c.

Prior to the amendment having been made by the Legis-
 lature by the 47 Vic. ch. 32 [contained in brackets] the

municipal corporations of cities and towns were authorized to pass by-laws regulating the erection or placing of buildings other than with main walls of brick, iron, or stone. Judgment.
MACMAHON,
J.

The "erection" of a building is the "construction" of a building, and the words "or placed," (as stated by Hagarty, C. J., in *Regina v. Howard*, 4 O. R. p. 380) "points at the drawing or bringing of a wooden building already erected to a new locality." So that over buildings to be constructed or erected within a designated area of a city or town, the municipality had authority in such cases to prescribe by by-law that the main walls of such buildings should be built with the materials mentioned in the statute.

By the amendment referred to in the above section, municipal corporations in cities, towns, and villages, were first authorized to pass by-laws regulating the repairing or alteration of *external walls of existing buildings*.

The building which the defendant was dividing into three stores or tenements, was an "existing building" many years prior to the passing of the by-law; but there was no charge against him of repairing or altering the external walls of such existing building in violation of the city by-law.

I think it is quite clear from the wording of the 10th sub-section of the Act that authority was not given, nor intended to be given to municipal councils to prescribe of what materials, or what should be the thickness of the internal walls, when alterations or repairs are made to an existing building.

It would be unfortunate if we were obliged to hold that the construction of the Act contended for by counsel for the city should prevail; for in that case the owner of a three-story building desiring to remove a lath and plaster partition five inches thick, and substitute a brick partition five inches thick with the design of converting the building into tenements or stores, no matter how much the safety of the building would be increased, could not make the alterations without being guilty of a violation of the present ordinance of the city.

The eighth section of the by-law under which the con-

Judgment. viction was made, does not draw any distinction as to the
MACMAHON, inner or dividing walls between a building to be erected,
J. and an existing building, for it states that "*every building* between the basement and top story which is to be divided into one or more stores, tenements, or dwellings, shall be so divided," &c.. so that the conviction is within the letter as well as the spirit of the by-law, which I must hold to be *ultra vires* of the corporation so far as it undertakes to prescribe of what materials and of what thickness the inner or dividing walls of a building already in existence are to be.

We were referred by Mr. MacKelcan to sub-sec. 18 of sec. 496 of R. S. O. ch. 184, and also to the judgment of Mellish, L.J., in *Weston v. Arnold*, L.R. 8 Ch. 1084 at p. 1093.

The above sub-section contains the legislative authority to the municipal corporations mentioned in sub-sec. 10 to pass by-laws regulating and enforcing the erection of party walls. And the judgment of Lord Justice Mellish, in the case referred to, is as to what constitutes a party wall within the meaning of a local Act of Parliament referred to in the judgment.

The walls built by the defendant for the purpose of creating the different stores or tenements, are not party walls, as the several stores or tenements are the property of one owner. The question as to whether a wall is a party wall or not, can only arise where a wall separating adjoining lands belonging to different owners is claimed by them as tenants in common.

Richards v. Rose, 9 Ex. 218, is useful as shewing what would be the position of a purchaser in regard to partition walls in the event of the defendant selling one of the shops or tenements.

The rule must be absolute, quashing the conviction without costs. There will be the usual protection to the magistrate and officers.

GALT, C. J., concurred.

ROSE, J., was not present at the argument, and took no part in the judgment.

[COMMON PLEAS DIVISION.]

REGINA V. AUSTIN.

Intoxicating liquors—Liquor License Act—Club incorporated under Benevolent Societies Act—Sale of liquor by.

Held, that the meaning of section 53, sub-sec. 3, of the Liquor License Act is that where in a club or society incorporated under the Benevolent Societies Act, liquor is sold or supplied to members, but such sale or supplying is not the special or main object of the club &c., but is merely an incident resulting from its principal object, there is no violation of the License Act, but it is otherwise if the sale or supplying the liquor is the main object of the incorporation.

The question however is for the decision of the magistrate on the evidence, and there being evidence in this case which was that of a club purporting to be a gun club, to support the finding of the magistrate that the sale of liquor was the special or main object of the club with the intent to evade the Liquor License Act, the Court refused to interfere with the finding, and dismissed a motion to quash a conviction made by him against defendant.

THIS was a motion to quash a conviction made by the Police Magistrate of the city of Toronto.

The facts, so far as material, appear in the judgment of MACMAHON, J.

In Easter sittings, June 7, 1889, *Bigelow* supported the motion, and referred to *Graff v. Evans*, 8 Q. B. D. 373.

Muclaren, contra, referred to *Newell v. Hemmingway*, 58 L. J. N. S. M. C. 47.

June 29, 1889. MACMAHON, J. :—

I think it reasonably clear that the magistrate was right in convicting the defendant.

The defendant is the secretary and treasurer of "The Owl Gun Club," which was incorporated under R. S. O. ch. 172, "An Act respecting Benevolent, Provident, and other Societies."

According to the constitution and by-laws of the club, the objects of its formation "are for mutual improvement in the art of shooting, and assisting to enforce the laws for the protection of game in this Province."

Judgment.
MACMAHON,
J.

The club is composed of one hundred and fifty members, and has rooms rented by and for the purposes of the club on King street, in this city; and, according to the evidence of John R. Humphrey, the President of the club, there are two rooms used for natural history and reading rooms, in which are six stuffed birds; and the club takes one paper, "The American Field;" some members give occasionally "Forest and Stream," and a member has his "World" delivered at the club, and it is left there. A third room has a pool table; and it is also used as a refreshment room, being fitted up with a small counter, and behind it a working board for mixing drinks, and where the steward, who is employed by the club, keeps ale, lager beer, whiskey, gin, cigars, and lemons for lemonade. Such of the members as desire can contribute to the liquor fund, and for the amount so contributed, the member receives tickets, which are accepted by the steward in settlement of the bills for liquor. About fifty per cent. of the members use the club room, and from twenty to twenty-five per cent. of the members contribute to the refreshments.

The defendant was found in the club rooms on the 17th of November, 1888, when visited by police inspector Stephens, who laid the information, and who found in the club rooms a counter, with glasses, bottles, and a large quantity of beer, lager beer, whiskey, gin, &c.

The conviction was made under the Liquor License Act, R. S. O. ch. 194, section 53, which is as follows:

(1) "Any society, association or club which has been or shall be formed or incorporated under *The Act respecting Benevolent, Provident, and other Societies* and any unincorporated society, association, or club, which has been or may be formed, or carried on chiefly for the purpose of selling, bartering, or supplying, or of enabling any such society, association, or club to sell, barter, or supply liquor to the members thereof, or to others without a license, under this Act, and so as by means of such organization to evade the operations of this Act, and any member, officer, or servant thereof, or person resorting thereto, who shall

sell or barter liquor to any member thereof, or to any other person without the license therefor by this Act required, shall be held to have violated section 49 of this Act and shall incur the penalties provided for the sale of liquor without license." Judgment.
MACMAHON,
J.

(2) "The keeping or having in any house or building, or in any room or place occupied or controlled by such club, association or society, or any member or members thereof, or by any person or persons resorting thereto, of any liquor for sale or barter, shall be a violation of section 50 of the Act,"

(3) "Proof of consumption or intended consumption of liquor in such premises by any member of such club, association or society, or person who resorts thereto, shall be conclusive evidence of sale of liquor, and the occupants of the premises, or any member of the club, association or society, or person who resorts thereto, shall be taken conclusively to be the person who has or keeps therein such liquor for sale or barter; and any liquor found upon such premises shall be liable to seizure in the manner provided for by this Act."

There was, I conceive, ample proof of "intended consumption of liquor in such premises" by the members of the club, so as to make the defendant liable as a member of the club to be held "to be the person who has or keeps therein such liquor for sale or barter," within the meaning of the above sub-sec. 3 of sec. 53, provided there was evidence upon which the magistrate could have found that the club had been incorporated or carried on specially or chiefly for the purpose of evading the Liquor License Act within the meaning of sub-sec. 1 of sec. 53.

The wording of sub-sec. 1 of sub-sec. 53, is peculiar, and the language difficult of construction. But I think the fair interpretation to be given to the section, is: That if a society or club is incorporated under "The Act respecting Benevolent, Provident, and other Societies," and the selling or supplying of liquor to its members is not the special or main object of the club, but is merely an incident resulting

Judgment. from its principal object, there is then no violation of the
MAOMAHON, License Act. But if the association or club has been
J. formed, or is being carried on specially or chiefly for
enabling it to sell, barter, or supply liquor to its members
without license, then the Liquor License Act has been
violated.

It is a question for the decision of the magistrate as to the object with which the club was formed, or is being carried on; and that decision could only be reached after a consideration of all the facts and circumstances appearing in evidence.

The ostensible objects of the club as evidenced by the possession of six stuffed birds, and the subscription by the club to one paper—"American Field"—for the use of 150 members, may not in the judgment of the magistrate have been sufficient to outweigh what appeared to be the real purpose of the club as indicated by having a bar supplied with the liquors mentioned, and a steward to dispense from the bar what was required in the way of refreshment by the members.

It is a case which is not by any means devoid of difficulty; but as long as there is evidence upon which the magistrate might properly find that the organization was designed to evade the operations of the Liquor License Act we could not interfere.

I have not overlooked the cases of *Graff v. Evans*, 8 Q. B. D. 373, and *Newell v. Hemingway*, 58 L. J. 46, where the right of proprietary clubs to supply liquor to the members thereof is fully considered in relation to the English licensing Act.

These cases are, however, of little value in determining the question to be decided in the present case under the special enactment I have endeavoured to construe.

The *certiorari* must be superseded, and the motion to quash the conviction dismissed, with costs.

GALT, C. J., concurred.

ROSE, J., was not present at the argument, and took no part in the judgment.

[COMMON PLEAS DIVISION.]

ANDERSON V. THE CANADIAN PACIFIC RAILWAY COMPANY.

Railways—Condition limiting liability for loss of baggage—Evidence—Letters written between the company's officers—Admissibility of—Limitation of action.

In an action by the plaintiff, a passenger by defendants' railway, for the loss of her baggage, and in which the defence was that the defendants' liability was limited by a condition on the ticket to \$100, certain letters were admitted in evidence, one written by the defendants' baggage agent to the passenger agent asking whether plaintiff's attention had been called to the condition on the ticket, and why it had not been signed by her, and the other the reply thereto, stating that the company's rules did not require unlimited first-class tickets signed, and that this ticket had been sold at full tariff rate.

Held, that the letters were properly admitted; but they were of no consequence as the ticket on its face shewed that it was not purchased subject to the condition.

Kirkbaldy Brewing Co. v. Furness Railway Co., L. R. 9 Q. B. 468, followed. *Held*, also, that the six months' limitation clause, R. S. C. ch. 109, sec. 27, does not apply to an action of this character arising out of contract, but to actions for damages occasioned by the company in the execution of the powers given or assumed by them to be given for enabling them to maintain their railway.

The cases on this subject reviewed.

THIS was an action brought to recover damages for the loss of the plaintiff's luggage. Statement.

The case was tried before Rose, J., and a jury, at Toronto, at the Winter Assizes, of 1889.

The grounds of defence were:

1 and 2. A denial of the allegations in the statement of claim; 3. That there was a special agreement limiting the damage to \$100; 4. An offer to pay plaintiff \$100 if defendants were liable; 5. That the damages were sustained more than six months before action.

At the close of the case a nonsuit was moved for, the grounds of which appear in the judgment of ROSE, J. The learned Judge reserved his decision thereon until after the jury should have answered the questions to be submitted to them.

The following questions were submitted to the jury:

1. Had the plaintiff knowledge of the conditions upon the ticket? No.

Statement. The 2nd, 3rd, and 4th questions had reference to the same subject.

The answer of the jury was: "Our opinion is, the plaintiff did not know of any special terms of the contract."

The 5th question was: "Was this accident caused by something which did not happen by the intervention of man—such as, by way of illustration, lightning, storm, or tempest—and which could not have been prevented by any amount of foresight, and pains, and care, reasonably to have been expected from the company? A. We believe the accident occurred by not taking proper precaution in building the embankment."

6th. What, in your opinion, was the cause of the accident? A. Want of proper drainage.

The learned Judge then delivered the following judgment:

ROSE, J. :—

This was an action brought by a passenger on the railway of the defendant company against the company as common carriers, claiming damages for loss occurring through a trunk which was with her luggage, and which contained personal clothing and jewellery, being destroyed on the line of the railway when in transit.

The right to recover was rested upon the common law liability of the defendants as insurers.

The answer made by the company was threefold: first, that the contract was one with conditions limiting the liability to not exceeding one hundred dollars; secondly, that the damage was caused by the act of God; and, thirdly, that the six months limitation clause in the Railway Act applied to relieve the company from liability, the action not having been brought within six months from the time the damage was sustained.

As to the first of these grounds, the jury find that the plaintiff had no knowledge of any conditions: that the defendant company had not taken any reasonable means to bring notice to her of the existence of the conditions; and that the circumstances surrounding the purchase of the ticket, and the entry into the agreement, were such that she might reasonably have supposed that the contract was without conditions.

These findings bring the case within the exceptions to the rule that a person is bound by the terms of a contract into which he enters whether he chooses to read the contract or not ; and disposes, I think, of the first objection.

Judgment.

Ross, J.

As to the second, the jury have found that the accident was caused by faulty construction, thus negating the idea of its being attributable to any superior force not under the control or within the intervention of man. In order to constitute such a defence there must be two things: first, an act which occurred without the intervention of man, and, second, a result such as could not, by the exercise of reasonable care, skill and ability, have been avoided by the parties charged with the loss.

As to the third question, that is, limitation, the cases of *Kelly v. Ottawa Street R. W. Co.*, 3 A. R. 616, and *May v. Ontario and Quebec R. W. Co.*, 10 O. R. 70, were relied upon as overruling the previous authority of *Roberts v. Great Western R. W. Co.*, 13 U. C. R. 615.

I have looked at the cases, and have come to the conclusion that the *Roberts Case* is a direct authority in favor of the plaintiff. That was an action brought by a passenger who was injured by a train running off the track.

The next case of *Auger v. Ontario, Simcoe and Huron R. W. Co.*, 9 C. P. 164, which is one of the cases relied upon or followed in *Kelly v. Ottawa Street R. W. Co.*, was a case of injury to horses on the track. There the Court held that the limitation clause did apply ; but the *Roberts Case* was not cited, nor disapproved of in any way, and apparently was not thought by either counsel or Court to be applicable to the facts in the *Auger Case*. *Browne v. Brockville and Ottawa R. W. Co.*, 20 U. C. R. 202, decided about the same time, in which judgment was given by Robinson, C. J., was a case of accident or collision at a crossing. In that case the *Roberts Case* was not cited or referred to in the judgment, which cannot be taken as in any way shaking its authority.

The case of *McCallum v. Grand Trunk R. W. Co.*, 30 U. C. R. 122, subsequently in the Court of Appeal, 31 U. C. R. 527, was a case of fire from the track. In the first report of that case the *Roberts Case* is not cited or referred to ; in the second report—in the Court of Appeal—it is cited in the argument, but not referred to in the judgment : but Hagarty, J., in giving judgment, says the facts of the *McCallum Case* may easily distinguish it from a case of liability under a contract ; thus recognizing the authority of the *Roberts Case*.

Judgment.

ROSE, J.

In *Kelly v. Ottawa Street R. W. Co.*, the injury was caused by a man jumping into a ditch to avoid collision with a car driven in a negligent manner. There the case is cited, but is not overruled. It is referred to approvingly by Mr. Justice Burton; and he says that the principle of the case might well have been followed in like cases.

That decision is rested—not upon principle, because the principle is objected to and dissented from by both the learned Judges who delivered judgment, except Mr. Justice Patterson, who probably approved of it—but upon the authority of the two previous cases of *Auger v. Ontario, Simcoe, and Huron R. W. Co.*, and *McCallum v. Grand Trunk R. W. Co.* But it in no way shakes the authority of the first case.

From some expressions found in *May v. Ontario and Quebec R. W. Co.* it would seem to be an authority in the defendants' favor, the learned Chief Justice, now Sir Adam Wilson, on p. 77, making use of the following language: "In that sense any damage done upon the railway by negligence in the carriage of passengers and the like, would be damage done 'by reason of the railway,' or, as Sir John Robinson put it, 'damage done by reason of the railway.'"

It, however, refers to the *Roberts Case*, without referring to the principle, and also to *Prendergast v. Grand Trunk R. W. Co.*, 25 U. C. R. 193, in which the clause was held not to apply. It in no sense questions the authority of these decisions; and, if it did, would not be authority which I could follow in the face of the previous authorities.

I must therefore find that *Roberts v. Great Western R. W. Co.*, is still the authority on that point.

Judgment must therefore be for the plaintiff on the question of limitation also.

Judgment for the plaintiff for \$644.40 principal, and \$63.40 interest.

The defendants gave notice of motion to the Divisional Court to set aside the judgment entered for the plaintiff, and to enter judgment for the defendants on the grounds set out in the judgment of GALT, C. J.

In Hilary Sittings, February 13th, 1889, *G. T. Blackstock*, supported the motion. The ticket was subject to

the conditions which limited the liability of the company to the sum of \$100 on a loss of baggage: *Watkins v. Rymill*, 10 Q. B. D. 178; *Burke v. South Eastern R. W. Co.*, 5 Q. P. D. 1; Pollock on Contracts, 4th ed., 365. The evidence as to the correspondence between Mr. Anderson, the general baggage agent, and Mr. Callaway, should not have been admitted. There was no evidence to shew that the defendants were responsible for the subsidence of the track. The evidence would tend to shew that it occurred from some convulsion of nature—namely, by lightning, storm, or tempest, and could not have been prevented by any amount of foresight, pains and care reasonably expected to have been exercised by the defendants: *Nugent v. Smith*, 1 C. P. D. 19, 423; Pollock on Contracts, 4th ed., 466; *Bailey v. De Crespigny*, L. R. 4 Q. B. 185; *Moxley v. Canada Atlantic R. W. Co.*, 14 A. R. 309. The action, however, was barred by lapse of time, as it is not denied that the action was not commenced within the six months required by sec. 27 of R. S. C. ch. 109; *Kelly v. Ottawa Street R. W. Co.*, 3 A. R. 616; *Browne v. Brockville and Ottawa R. W. Co.*, 20 U. C. R. 202; *May v. Ontario and Quebec R. W. Co.*, 10 O. R. 70. Argument.

McCarthy, Q. C., and *Wallace Nesbitt*, contra. The evidence failed to shew that the ticket was subject to the condition relied on. It is only to be subject thereto when issued at a reduced rate, and signed by the person purchasing the ticket, and it is then stamped with an L. punch. The contract is not signed by the plaintiff, nor is it stamped as provided. The evidence of the correspondence between Mr. Anderson and Mr. Callaway was properly admitted: *The Earl of Dumfries*, 10 P. D. 31; *The Solway*, 10 P. D. 137; and it clearly shewed that the ticket was not issued at a reduced rate so as to be subject to the condition. As to the cause of the accident, the matter was fairly left to the jury, and they have found it was from want of proper drainage: *Roscoe N.P. Ev.*, 15th ed., 561, 683; *Braid v. Great Western R. W. Co.* 1 Moo. P. C. N. S. 101; *Smith on Negligence*,

Argument. 2nd ed, 188 ; *Nichols v. Marsland*, 2 Ex. D. 1 ; *Nugent v. Smith*, 1 C. P. D. 19. As to the lapse of time, section 27, which contains the limitation clause, does not apply. It only applies to actions for damages occasioned by the company in the execution of the powers in connection with the working of the railway, but does not apply to a case like present—namely; a contract to carry baggage safely as common carriers: *Roberts v. Great Western R. W. Co.*, 13 U. C. R. 615 ; *Auger v. Ontario, Simcoe and Huron R. W. Co.*, 9 C. P. 164 ; *Broune v. Brockville and Ottawa R. W. Co.*, 20 U. C. R. 202 ; *McCallum v. Grand Trunk R. W. Co.*, 30 U. C. R. 122, 31 U. C. R. 527 ; *Prendergast v. Grand Trunk R. W. Co.* 25 U. C. R. 193 ; *Corporation of Brock v. Toronto and Nipissing R. W. Co.*, 37 U. C. R. 372 ; *Beard v. Credit Valley R. W. Co.*, 9 O. R. 616.

June 29, 1889. GALT, C. J.:—

In my opinion, there were no special conditions on the ticket purchased by the plaintiff. The ticket was produced, and several conditions are printed on it, and, among others, one limiting the liability of the company for loss of baggage to \$100. Immediately below these conditions there is this agreement: "In consideration of the reduced rate at which this ticket is sold, I hereby agree to all the provisions of the above contract."*Signature.*"

This was not signed by the plaintiff; and it was proved that the ticket was not sold at a reduced rate. There was, therefore, no agreement on the part of the plaintiff to any of the above conditions. There was a question raised as to the evidence of the ticket not having been sold at a reduced rate; but, on the face of the ticket itself, there is, among the conditions, a stipulation which proves that it was not so sold. "4. If this contract and its coupons are cancelled with an L punch, it indicates that this ticket was sold at a reduced rate." The ticket is not so cancelled. It is therefore plain that the ticket was not subject to the conditions.

On the argument before us, Mr. Blackstock urged that it was possible the subsidence of the track, which caused the accident, might have occurred from some convulsion of nature (of which there was no evidence), therefore the defendants were discharged. I think it safer to act on finding of the jury, who had ample testimony before them as to the manner in which the embankment had been constructed, and as to the action of water thereon.

Judgment.

GALT, C.J.

As to the last and really important defence, viz., the lapse of time, no question was submitted to the jury, as it was not disputed the action was not commenced within the six months.

The learned Judge reserved judgment, and subsequently gave a considered judgment in favour of the plaintiff, holding that the plaintiff was not precluded by that delay.

At the last Hilary Sittings, the defendants moved for judgment in their favour, or for a new trial, on the following grounds:

1. "That the said findings and the verdict of the jury are contrary to the evidence and weight of evidence."

In my judgment there was ample evidence to sustain the findings.

2. "That the learned Judge at the trial improperly admitted as evidence against the defendants certain letters written by one W. R. Callaway to other of the defendants' servants."

This is the circumstance to which I have already alluded in referring to the sale of the ticket to the plaintiff. The letters in question were produced by the defendants. The first was written by Mr. Anderson, general baggage agent, to Mr. Callaway, the passenger agent, desiring to know whether the plaintiff's attention "was called to the conditions under which this ticket was sold to her, and why not signed by her;" and the second, in reply, from Mr. Callaway, stating "the rules of the company do not require unlimited first class tickets signed. This ticket was sold at full tariff rate."

Judgment.

GALT, C.J.

In my opinion this evidence was clearly admissible. This was a question put by an officer of the defendants in charge of the department "of baggage," to another officer by whom the ticket in question was sold, relating to the sale of the ticket, and appears to me to be clearly within the decision of the Court of Queen's Bench, in the case of *Kirkstall Brewery Co. v. Furness Railway Co.*, L. R. 9 Q. B. 468. It certainly is singular that the defendants, when in possession of this correspondence, should have thought it expedient to raise such a defence; moreover, it is a matter of no consequence, as, on the face of the ticket itself, it is subject to no conditions.

The third ground is, "That plaintiff is not entitled to recover more than \$100, by reason of the conditions indorsed upon the ticket." I have disposed of this ground, as I do not think there were any conditions limiting the liability.

4. "That the accident out of which the plaintiff's cause of action arose was caused by the act of God, or by some other extraordinary or unforeseen cause, for which the defendants are not liable in law to the plaintiff." I have already commented on this ground.

5. "That the defendants are not liable to the plaintiff for the negligence in the construction of the railway, as found by the jury, at the place in question."

On the argument, this objection was mentioned, but was not argued, as it was impossible for the learned counsel to contend that, after the defendants had been in possession of the railway for a considerable time as their own property, they could be heard to say in a case like the present brought against them as common carriers, they were not liable because the original construction of the railway was defective.

6. "That the plaintiff is precluded, by the six months limitation clause in the Railway Act, from bringing this action against the defendants."

This is really the only question in dispute between the parties. My brother Rose has carefully considered it in his judgment, and it was very fully and ably argued by

Mr. Blackstock, for the defendants, and Mr. McCarthy, Q.C. and Mr. Nesbitt, for the plaintiff. Judgment.
GALT, C.J.

The ticket was purchased by the plaintiff in October, 1886, and the accident occurred a few days afterwards. The writ of summons was issued on 15th September, 1887. The clause in the Railway Act R. S. C. ch. 109, under which this question arises is sec. 27, under the heading, "Actions for indemnity; fines and penalties and procedure therefor."

Sec. 27. "All actions or suits for indemnity for any damage or injury sustained by reason of the railway" (that that is to say, the railway and the works authorized by the special Act to be so constructed), "shall be commenced within six months next after the time when such supposed damage is sustained, or if there is continuation of damage, within six months after the doing or committing of such damage ceases, and not afterwards; and the defendants may plead the general issue and give this Act and the special Act and the special matter in evidence at any trial to be had thereupon, and may prove that the same was done in pursuance of and by the authority of this Act, and the special Act."

Secs. 28 and 29, which are the other sections under the same heading, refer to the enforcement of penalties to which persons violating the provisions of the Act are liable.

The first case in which a railway company sought to avail themselves of this limitation is *Roberts v. Great Western R. W. Co.*, 13 U. C. R. 615, which was an action brought by a passenger for damages by reason of the car being thrown off the track, owing to the alleged negligence of the company. The Court were unanimously of the opinion that the tenth section of the Act incorporating the company (which is similar to sec. 27) does not apply to an action of that nature, but only to actions for damages occasioned by the company in the execution of the powers given, or assumed by them to be given, for enabling them

Judgment. to maintain their railway." It was upon the authority of this case my brother Rose based his judgment.

GALT, C.J.

The next case is *Auger v. Ontario, Simcoe, and Huron, R. W. Co.*, 9 C. P. 164, which was an action brought to recover damages for the loss of the plaintiff's horses, which were killed by a locomotive.

The Court held in that case the limitation did apply : but, in giving judgment, Richards, J. says: "There is no doubt the Courts have held repeatedly that the limitation clauses do not apply where the companies are carrying on the business of common carriers, "even in those cases where they are permitted by their Act of incorporation to use locomotives, &c., for the conveyance of passengers and goods, &c., and to charge for such conveyance; but the liability arises in those cases from the breach of contract arising from their implied undertaking to carry safely, and to take proper care of the goods." This case, therefore, so far as the reasoning of the learned Judge in giving the unanimous decision of the Court, is in favour of the plaintiff.

The next case is *Browne v. Brockville and Ottawa R. W. Co.*, 20 U. C. R. 202, which was for an injury sustained by plaintiff by collision at a crossing, owing, as was alleged, to the neglect of defendants to give signals, and to construct crossings at a proper level. Robinson, C. J., by whom the judgment was given, and before whom the case had been tried, held, at p. 207, that, "as to the cause of damage arising from the improper or imperfect construction of the crossing, that does certainly come expressly within the words in our statute."

Mr. Blackstock contended that, as the cause of action in the present case arose from the defective construction of the railway, this case was a direct authority in his favour.

In my opinion it is not so, for this reason: In the present case the defendants had entered into a contract with the plaintiff to carry her baggage safely as common carriers, and it was their duty to see that the railway was in a proper state. In the case cited the defen-

dants were under no obligation to the plaintiff, apart from the public generally ; and the clause in question has reference only to such an obligation, not to any special contract.

Judgment.
GALT, C.J.

The case of *Kelly v. Ottawa Street R. W. Co.*, 3 A. R. 616, was also cited by Mr. Blackstock ; but that has no bearing on the present contention, for, unquestionably, the injury complained of was one sustained by the manner in which the railway was managed.

The last case referred to on behalf of the defendants was *May v. Ontario and Quebec R. W. Co.*, which was before Wilson, C. J., on demurrer, 10 O. R. 70. The learned Chief Justice gave judgment on the demurrer in favour of the defendants ; but it was more a matter of form, for he finally stated that the statement of claim was insufficient, and then, on the authority of *McCallum v. Grand Trunk R. W. Co.*, and *Kelly v. Ottawa Street R. W. Co.*, decided the demurrer.

I may mention that *McCallum v. Grand Trunk R. W. Co.*, 30 U. C. R. 122, 31 U. C. R. 527, was one for injury caused by fire from the locomotive of the defendants, and was held by the Court of Appeal to come within the provisions of the statute. There was no question of contract. Mr. Neshitt cited several cases bearing on this question, but there were none of them which had reference to any contract.

I agree with my brother Rose, that the principle stated in *Roberts v. Great Western R. W. Co.*, has not been questioned in any of the other cases, but, on the contrary, is affirmed by the reasoning of the learned Judge in *Auger v. Ontario, Simcoe, and Huron R. W. Co.*; and this motion must be discharged, with costs.

ROSE and MACMAHON, JJ., concurred.

[QUEEN'S BENCH DIVISION.]

RUDD V. FRANK.

Evidence—Admissibility—Communications by deceased person to solicitors—Privilege—Judgment for possession of land—Practice on entering—Order of trial Judge—Writ of possession—Rules 273, 274, 275, 341, 379, O. J. A.—R. S. O., 1877, ch. 51, sec. 34.

In an action by the devisee of R. to recover possession from the defendant of land conveyed by him to R., of which the defendant remained in possession, the defence was that the conveyance to R., though in form absolute, was intended to operate as a mortgage.

The evidence of E. and P., two solicitors, as to statements made to them by R. in his lifetime as to his intentions with regard to the land, was taken subject to objection.

The evidence of E. shewed that R.'s statement to him was made in E.'s office in the presence of P. and of another person who was a friend of R.'s, but not a professional man. E. thought R. made the statement as a preliminary to instructing him as to something that was to be done by him as a solicitor, but R. did not give any instructions, and there was nothing to shew that he ever intended to do so, and no professional employment followed from the conversation. E. could not recollect whether he was asked for his advice or opinion at the time, but he made no charge for professional services.

P.'s evidence was that he had spoken to R. about the affairs of F. as the solicitor and a friend of the F. family, and had advised R. to try to save the property in question for the F. family.

It also appeared that R. was an occasional client of E. and P., but that in the transactions in question he had employed other solicitors.

Held, that the communications to E. and P. were not made to them in their professional capacity, and were therefore not privileged, and were properly receivable in evidence; *FALCONERIDGE, J.*, doubting as to the evidence of E.

The action was tried without a jury before the Consolidated Rules came into force, and the trial Judge ordered that judgment should be entered for the plaintiff for possession of the land, and judgment was at once entered accordingly, and the plaintiff put in possession by the sheriff under a writ of possession.

Held, that under the practice, and having regard to Rules 273, 274, 275, 341, and 379, of the Ontario Judicature Act, 1881, there was nothing to remove actions for the recovery of land out of the general rule, and the entry of judgment and subsequent proceedings were regular.

Section 34 of R. S. O., 1877, ch. 51, was repealed by Rule 273 of the Ontario Judicature Act, 1881.

Statement

THIS was an action brought by the plaintiff to recover possession of a parcel of land in the township of Westminster, containing 130 acres, and of certain chattel property thereon.

The plaintiff claimed title as devisee under the will of Charles B. Rudd, deceased, to whom the defendant conveyed the land in the year 1875.

The defence set up was that the conveyance from the defendant to Rudd, though absolute in form, was really intended to operate as a mortgage, and that it had been satisfied by payments to him out of the produce of the property. There was the usual offer to redeem if anything should be found due. Statement.

The action was tried at London on the 15th May, 1888, before MACMAHON, J., without a jury, and judgment was delivered by him on the 23rd June, 1888, ordering judgment to be entered for the plaintiff for the recovery of the land and goods and refusing to allow any redemption, upon the ground that the conveyance from the defendant to Rudd was absolute in substance as well as in form. No stay of proceedings was ordered, and judgment was promptly entered by the plaintiff, who was placed in possession by the sheriff under a writ of possession issued upon the judgment.

In November, 1888, the defendant moved before the full Court to set aside this judgment and enter judgment for the defendant, or for a judgment for redemption, or for a new trial upon the ground of rejection of the evidence of Messrs. Partridge and Essery.

After hearing argument the Court ordered, in February, 1889, that certain books of account which it appeared had been kept by Rudd in his lifetime, and had not been produced at the trial, should be produced for inspection, and that the evidence of Messrs. Partridge and Essery should be taken before Mr. Justice STREET at the Middlesex Spring Assizes, and that the question of its admissibility should be argued at the May Sittings of the Divisional Court. This evidence was accordingly taken, and the motion again came before the Divisional Court (FALCONBRIDGE and STREET, JJ.) on the 5th and 6th June, 1889. Upon the argument of the motion the defendant renewed a motion made upon the former argument, to set aside the entry by the plaintiff of judgment and the issue of the writ of possession, upon the ground that it was irregular and im-

Statement proper to have entered the judgment until after the fifth day of the sittings of the Divisional Court next after the delivery of judgment. The defendant also moved upon notice for leave to adduce as further evidence the short-hand notes of the evidence of the plaintiff and Rudd given in a suit of *Haldane v. Rudd*, which was tried in the year 1877.

W. R. Meredith, Q. C., and *R. M. Meredith*, for the defendant. The evidence of Messrs. Partridge and Essery is admissible, the communications made to them having, on the facts disclosed, had no reference to any professional employment: *Goodall v. Little*, 1 Sim. N. S. 155; *Walton v. Bernard*, 2 Gr. at pp. 363, 364, and cases there cited; *Bursill v. Tanner*, 16 Q. B. D. 1; *Pawson v. Merchants' Bank*, 11 P. R. 18; Cordery on Solicitors, 2nd ed., p. 195. On the question of cutting down the deed to a mortgage, see Coote's Law of Mortgages, 5th ed., pp. 18, 19, 20; *Douglas v. Culverwell*, 4 D. F. & J. 20; *Hills v. Loomis*, 42 Vt. 562. The question of practice as to entering judgment is covered by Rules 352, 379, 380, O. J. A., 1881, which were in force when judgment was entered.

E. R. Cameron, for the plaintiff. The evidence in the suit of *Haldane v. Rudd* should not be received; evidence not before the trial Judge should not be received for the purpose of reversing his judgment: *Dumble v. Cobourg and Peterborough R. W. Co.*, 29 Gr. 121; Taylor on Evidence, 8th ed., p. 653, sec. 739. As to the evidence of Messrs. Partridge and Essery, it is a safe rule, where a number of years have elapsed, and the solicitor is in doubt whether the communication was privileged or not, that the onus should be on the party who contends that it is not privileged. Mr. Partridge's evidence is strongly in favour of the plaintiff's contention as to privilege. A sum certain was paid by Mr. Rudd, and he received the conveyance of the land. The transaction was a plain one between vendor and purchaser; and no foundation was laid for parol evidence. See *Bernard v. Walker*, 2 E. & A. 121. Even if

parol evidence is admitted, the testimony given is contradictory, and the Court will not interfere unless the case is beyond peradventure. The provisions applicable to the entry of judgment and the issue of a writ of possession are Rules 273-5, 341, 379, O. J. A., 1881. Con. Rule 767 is declaratory of the former practice. Argument.

June 22, 1889. STREET, J.:—

Since the trial of this action before MACMAHON, J., several important pieces of evidence have in one way or other come before us. The books of account kept by Mr. Rudd in his lifetime, in which he appears to have kept an account with the defendant and charged the defendant with his outlay in keeping up the farm in question, which has always been in the defendant's occupation, do not appear to have been produced at the trial. The learned Judge refused to take the evidence of Messrs. Partridge and Essery upon the ground that it appeared to be privileged: this evidence has since been taken subject to the question of its admissibility, and if admissible it is certainly not without weight. Then there is the evidence of the plaintiff and Mr. Rudd taken in the case of *Haldane v. Rudd*, within about two years of the time when the defendant made the conveyance now in question to the plaintiff, which has come to light since the former trial, and which seems to have a strong bearing upon the issue raised here. The plaintiff's counsel insists that if this evidence is received, she should have an opportunity of explaining it, and that she should also have an opportunity of explaining the entries in her husband's books, and it is manifestly only fair to her that such an opportunity should be afforded to her. We might perhaps have allowed this new evidence to be taken before the presiding Judge at the next Middlesex Assizes, so as to save the expense of trying the whole matter over again; but the production of the plaintiff's evidence in *Haldane v. Rudd* may have an effect upon the statements made by her at the last trial, and it would

Judgment. be unsatisfactory that so important a case should be tried
STREET, J. piece meal before different Judges. We think, therefore, that the whole case must go down and be tried again without a jury, as before.

I think the evidence of Messrs. Partridge and Essery should be received, and that the communications made by Mr. Rudd to them were not privileged, because they were not made to them in a professional capacity as his solicitors. Mr. Essery's account of the circumstances under which the communication was made of which he speaks, is as follows: "There was a conversation in our office. Mr. Rudd came there; he came into the office one day. I think there were four of us in the office there one time, Mr. Partridge, Mr. John Coote, Mr. Rudd, and myself; whether there were any more or not, I cannot remember, but I think those four were there. He came in, sat down, and talked about John B. C. Frank and his affairs * * he said that J. B. C. Frank had got into difficulties in connection with some lightning rod, or some company of that kind; that he was mixed up and behind, and that there were executions against him, and that on account of it being in the family he was going to take over this farm: that is, that it was going to be made over to him, and that he was going to hold it for John B. C. Frank, and he was going to stay on the farm, use it as his own, and when he paid him back what he advanced on it, it was to be his; that he was doing it for the purpose of keeping it in the family. The reason I took notice of what he said was so as to be able to tell it now. I thought he was instructing us at that time as to something that was to be done in the future, or was going to instruct us.

"Q. Had you anything to do at all with it, or had your firm anything to do with the transaction? A. No, he went away without giving us any instructions except telling us in that way. I supposed at that time that he was talking to us as a matter of business, but no business followed from it afterwards.

"Q. Did he ask you any advice or opinion in regard

to it at all? A. I cannot recollect that. I know we did not charge for anything.”

Judgment.

STREET, J.

Mr. Essery then went on to say that Rudd was often in their office; that he would come in and sit down and ask for Mr. Partridge and Mr. Coote, and that he has heard the matter talked of on more than one occasion; that Mr. Rudd would start off and tell what he was going to do; that afterwards he understood from Mr. Rudd's coming backwards and forwards that he had paid off the debts, and Frank had been relieved.

It appeared from the evidence of Mr. Partridge that he had acted some time before in winding up the Frank estate, in which both Rudd and Frank were interested, and that Partridge had spoken to Rudd at the request of J. B. C. Frank's mother and sisters, for whom he had been acting as a friend and as their solicitor; that he talked the matter over with Mr. Rudd and advised him under the circumstances to try to save the property for the family, and that he charged him nothing; that Rudd came to the conclusion that he would take the place and save it.

It also appeared that Mr. John Coote was not a solicitor, but was a friend of Rudd's and a client of Messrs. Partridge and Essery; that Rudd was an occasional client of theirs, but upon this occasion employed other solicitors; that he was in the habit of frequently going to the office of Messrs. Partridge and Essery, and sitting there and talking to them and to Mr. John Coote.

The occasions spoken of by both Messrs. Partridge and Essery appear to me to be occasions upon which the communications made to them were clearly not made to them in their professional capacity. The Frank family saw that John B. C. Frank was getting into trouble and debt, and they spoke about it to their friend and solicitor, Mr. Partridge: in one or both of those capacities he spoke to Rudd upon the subject and suggested, or, as he puts it, advised, that he should take the property and pay the liabilities, which Rudd finally did, but he employed another solicitor in the matter. The conversation of which Essery speaks

Judgment. cannot, it seems to me, be treated as a confidential communication; it was a statement made to persons who were not acting as solicitors in the transaction to which it related; they were not asked to give any advice in the matter, or to do anything in regard to it; and it was made apparently as much to Coote as to the solicitors. The fact that one of the solicitors supposed that the result of it would be that he would be employed to draw a conveyance cannot turn it into a privileged communication, unless it should appear that Rudd intended the statement as a preliminary to the giving of such instructions; it is evident that he did not, for at the end of his statement he gave no such instructions. If Messrs. Partridge and Essery were solicitors for any one in the matter, it was for the Franks and not for Rudd, and the probabilities seem to be that the statement made in their office was merely to convey to Mr. Partridge that the suggestion which Partridge had made to him on behalf of the Frank family had been adopted by him. See *Smith v. Daniell*, L. R. 18 Eq. 649; *Holmes v. Matthews*, 3 Gr. at p. 384; *Lyell v. Kennedy*, 9 App. Cas. 81; *Minet v. Morgan*, L. R. 8 Ch. 361; *Thomas v. Rawlings*, 27 Beav. 140; and the cases collected in Cordery on Solicitors at pp. 120 *et seq.*

I think the possession obtained by the plaintiff should not at present be disturbed. She has the legal right to the possession even though the defendant should be held to have a right to redeem her; and the defendant has shewn no right to hold possession against her.

The judgment, in my opinion, was regularly signed.

The question is to be determined under the practice existing at the time the judgment was entered, which was before the Con. Rules came into force.

I think the point is governed by J. A. Rules 273, 274, and 275, which provide that the Judge may direct at or after the trial that judgment be entered for either party, and that his direction shall be authority to the proper officer to enter the judgment accordingly; and by J. A. Rule 341, which provides that a judgment for the recovery

of the possession of land may be enforced by writ of possession; and by J. A. Rule 379, which provides that the manner of enforcing such a judgment shall be the manner theretofore used in actions of ejectment in the Superior Courts of Common Law. I do not read Rule 379 as referring to the period at which judgment may be entered, but only as to the practice in enforcing it. The Rules to which I have referred are treated in the last revision of the statutes as having repealed section 34 of the Ejectment Act, ch. 51, R. S. O., 1877, and I think properly so, and if this be so, there was nothing to remove actions for the recovery of the possession of land out of the general rule of practice which entitled a plaintiff to enter his judgment in an action tried without a jury immediately upon its being pronounced, if an order for the entry of judgment formed, as it does here, a part of the order then made. As there is to be a new trial, however, the judgment must be set aside, but the plaintiff must be allowed to remain in possession until and unless otherwise ordered. The costs of the former trial and of the entry of judgment, and of the writ of possession and sheriff's fees, and of the motions, and of the taking of the evidence of Messrs. Partridge and Essery at the last London Assizes, should be costs in the cause to the successful party. No action must be taken against the sheriff or any one else for having acted upon the judgment which is set aside.

Judgment.

STREET, J.

FALCONBRIDGE, J. :—

I agree with all that my brother Street has said, except that I desire to express a doubt as to the admissibility of Mr. Essery's evidence. Mr. Essery says: "I thought he (Rudd) was instructing us at that time as to something that was to be done in the future, or was going to instruct us."

Suppose a client after a conversation such as that described, carried on, as the solicitor thinks, with a view to instructing him, afterwards changes his mind or his solicitor, is the privilege thereby removed?

I do not dissent.

[QUEEN'S BENCH DIVISION.]

RE ARMSTRONG AND THE TOWNSHIP OF TORONTO.

Municipal corporations—By-law in aid of harbour works—Raising money by loan—Time of repayment uncertain—R. S. O. ch. 184, sec. 340, sub-sec. 2; sec. 293, sub-sec. 1—Submitting by-law to electors—Day fixed for taking votes—Motion to quash—Applicant voting against by-law not estopped—Costs.

Section 340 of the Municipal Act, R. S. O. ch. 184, which authorizes municipal councils to pass by-laws for contracting debts, &c., provides, sub-sec. 2, that the whole of the debt and the obligations to be issued therefor shall be made payable in twenty years at furthest, from the day on which such by-law takes effect.

A by-law of a municipality to raise by way of loan \$3,000 to aid in repairing harbour works, provided that the debentures should be made payable annually, the first payment to be made on the 15th day of December in the year next succeeding the year in which the "repairs will have been completed."

Held, that, as the time of repayment was uncertain, the by-law was not in accordance with sec. 340, sub-sec. 2, and was therefore illegal and should be quashed.

Seemle, also, that it was a fatal objection to the by-law that the day fixed by it for taking the votes of the electors thereon was more than five weeks after the first publication, contrary to sec. 293, sub-sec. 1, of the Act.

Held, also, that the applicant had not by voting against the by-law disentitled himself to apply to the Court to quash it, or to the costs of his motion.

Statement.

On May 31, 1889, *E. G. Graham*, for Robert Armstrong, obtained from ROSE, J., an order *nisi* to quash by-law No. 493 of the municipal corporation of the township of Toronto, being a by-law to raise by way of loan \$3,000 to aid the Port Credit Harbour Company in repairing the harbour works, upon the following grounds:

1. That the day fixed by the by-law for taking the votes of the electors thereon was more than five weeks after the first publication of the proposed by-law.

2. That the municipal council of the township did not by the by-law make the principal and interest, or either, of the debt proposed to be incurred, repayable within twenty years from the date the by-law took effect, and the instalments of principal and interest of the debentures proposed to be issued under the by-law were to be paid

only on a contingency which might not arise for a number of years, and which might never arise. Statement.

3. That owing to the indefinite term within which the instalments were to be paid, no leaseholders holding a lease for the term of ten or more years from the date when the by-law took effect could vote thereon, whereby a large number of leaseholders might have been excluded from voting.

4. That a number of leaseholders, land-owners' sons, and occupants voted upon the by-law who were not qualified voters, and the by-law was actually defeated at the polls.

The objections were substantiated by affidavits filed on the part of Armstrong. An affidavit in answer was put in shewing that the by-law had been acted on by the harbour company, who had relied upon it and incurred expense on the faith of it.

The first publication of the by-law was on the 30th November, 1888, and the votes of the electors were taken thereon on the 7th January, 1889. The by-law was registered on the 2nd March, 1889.

It provided amongst other things that the debentures should be made payable annually, "the first payment to be made on the 15th day of December in the year next succeeding the year in which the said repairs will have been completed," and interest to be payable in the same way.

June 18, 1889. *E. G. Graham* supported the order *nisi*.

1. The by-law required the assent of the electors by sec. 479, sub-sec. 8 (a), of the Municipal Act, R. S. O. ch. 184, and as the assent was not obtained in conformity with the provisions of sec. 293, sub-sec. 1, being voted on upon a day more than five weeks after the first publication, it is bad. 2. By sec. 340, sub-sec. 2, the whole of the debt and the obligations therefor are to be payable in twenty years at furthest from the day on which the by-law takes effect. Here the debentures are to be payable at an uncertain period, and the by-law is therefore bad on its face. Not a

Argument. probability but a certainty is required. See *In re Lloyd and Elderslie*, 44 U. C. R. 235; Harrison's Municipal Manual, 4th ed., p. 252. The application, being made within three months from the registry of the by-law, is in time under sec. 352 of the Act, a certificate having also been registered since the order *nisi* was obtained, within the three months. See *Bickford v. Chatham*, 14 A. R. 32. 3. No leaseholder could take the oath under sec. 311 of the Act, that his lease extended for the period of time within which the debt to be contracted or the money to be raised is made payable. This prevented many from voting. 4. Upon the affidavits the by-law did not receive the assent of the ratepayers, and it should be quashed: *Boulton v. Peterborough*, 16 U. C. R. 380; *Canada Atlantic R.W.Co. v. Ottawa*, 8 O. R. 201; 12 A. R. 234; 12 S. C. R. 365.

Beynon, Q.C., and Ritchie, Q.C., for the township corporation, shewed cause. 1. Sec. 293 is merely directory, and the Court is not bound to see that its provisions are strictly carried out. The voting was three days later than it should have been, but there was a saving of expense, it being on the same day as the municipal elections, and more persons voted in consequence. Sec. 332 of the Act says the Court *may* quash the by-law. There is a discretion: *Sutherland v. East Nissouri*, 10 U. C. R. 626; *Boulton v. Peterborough*, *supra*. 2. What is objected to by the second ground of the order *nisi* is a mere irregularity for which the Court is not bound to quash the by-law, even if it is apparent on the face thereof: *In re Gibson and Huron*, 20 U. C. R. 111; *In re Gilchrist and Sullivan*, 44 U. C. R. 588; *In re Lloyd and Elderslie*, *supra*; *Re Farlinger and Morrisburg*, 16 O. R. 722. Sub-sec. 2 of sec. 340 does not require that the by-law itself shall state that the debt is to be payable in twenty years. It enacts that it shall be "made payable"—not necessarily by the by-law itself. It is not to be presumed that it will be made payable contrary to law. There is an obligation on the harbour company to commence and complete the work within a reasonable time, and if they do not, they cannot call for the money,

and so no injury can be done to anyone. The objection is therefore technical and not substantial. See *Canada Atlantic R. W. Co. v. Ottawa*, 12 A. R. 234. 3. and 4. There is no evidence of any leaseholder being deterred from voting. The qualification of those who did vote might have been ascertained by a scrutiny before the County Judge under sec. 323. There are persons entered on the list as land-owners' sons, but that does not indicate that they had no right to vote. The applicant voted, and took his chances, after seeing the notice, so he is now estopped : *Helm v. Port Hope*, 22 Gr. 273 ; *Regina ex rel. Regis v. Cusick*, 6 P. R. 303 ; *Regina v. Lofthouse*, L. R. 1 Q. B. 433, 444. At all events he should have no costs. The proper procedure is by notice of motion, not by order *nisi* : *Re Peck and Ameliasburgh*, 12 P. R. 664.

Graham in reply. The applicant voted, but against the by-law.

September 9, 1889. FALCONBRIDGE, J. :—

The motion is to quash by-law No. 493 to raise by way of loan \$3,000 to aid the Port Credit Harbour Company in repairing the harbour works.

The first ground taken in the order *nisi* is :

1. That the day fixed by said by-law for taking the votes of the electors thereon was more than five weeks after the first publication of the by-law.

Sec. 293 of the Municipal Act provides, sub-sec. 1, that the day fixed for taking the votes shall not be less than three nor more than five weeks after the first publication of the proposed by-law.

The first publication here was on 30th November, 1888. The votes were taken on 7th January, 1889, (three days after the expiry of the five weeks), and on the same day as the ordinary municipal elections were held.

Taking the vote on the day of the municipal elections was convenient ; it saved expense, and it doubtless secured a larger expression of the opinion of the electors than if a

Judgment.
Falconbridge,
J.

separate day and hour had been named. I cannot conceive how any one or any interest could be prejudiced by that day being appointed instead of a day half a week earlier. The objection is of the most technical, and the question is, whether I am bound to give effect to it and to see that the provisions of the statute have been strictly carried out.

I am inclined to think this objection is fatal, but there is another objection which is, in my opinion, not a mere irregularity, and which is insuperable.

It is that the municipal council of said township have not by said by-law made the principal and interest, or either, of the debt proposed to be incurred repayable within twenty years from the date the said by-law took effect, and the instalments of principal and interest of the debentures proposed to be issued under said by-law are to be paid only on a contingency which may not arise for a number of years, and which may never arise.

The by-law enacts (after reciting, amongst other things, that the council are willing to submit for the approval of the qualified ratepayers of said township a by-law granting aid to the harbour company, to the extent of \$3,000, provided that such sum of \$3,000 be payable to said company only after said company have expended the sum of \$6,000 in repairs to the harbour. . . .)

1. That it shall be lawful for the reeve to raise by way of loan, &c., a sum of money not exceeding in the whole \$3,000, and to cause the same to be paid into the hands of the president of the said harbour company, on the fulfilment of the conditions recited.

* * * * *

3. That the said debentures shall be made payable annually at the Dominion Bank in Brampton * * and shall have attached to them coupons for the payment of interest * * *on the 15th day of December in each and every year, the first payment to be made on the 15th day of December in the year next succeeding the year in which the said repairs will have been completed.*

4. * * interest shall be payable annually on the 15th December in each year * * the first payment to be made payable on the 15th December in year next succeeding (as in 3rd.) Judgment.
Falconbridge,
J.

5. Provides for raising by special rate \$379.15 per annum for ten years.

7. The by-law to take effect from, on, and after the 15th January, 1889.

The council derives its power to pass a by-law to grant aid for the construction of harbours from the Municipal Act, sec. 479, sub-sec. 8, with which are to be read the provisions of the Act in respect of by-laws for creating debts.

Sec. 340, sub-sec. 2, says "If not contracted for gas or water works, or for the purchase of public works * * the whole of the debt and the obligations to be issued therefor shall be made payable in twenty years at furthest, from the day on which such by-law takes effect."

There is a peculiarity about the words of this sub-sec. 2. Sub-section 1 says the by-law shall name a day; sub-sec. 3, the by-law shall settle a certain specific sum * * ; sub-sec. 5, the by-law shall provide * * ; sub-sec. 6, the by-law * * shall recite.

Sub-sec. 2, which provides that the whole of the debt shall be made payable in twenty years at furthest, does not say it shall be so specifically stated in the by-law, unless that provision must be read into the sub-section from the words, "no such by-law shall be valid which is not in accordance with the following restrictions and provisions."

A by-law would be invalid which on its face made any part of the debt or the obligations to be issued therefor payable in more than twenty years. I think it must also be invalid when the time of repayment is uncertain or contingent on the happening of a named event. How can, in such a case, a practical application be made of sec. 309, so as to include every leaseholder who may be entitled to vote?

Judgment. The repairs may be completed, it is said, within a year.
Falconbridge, J. Is a leaseholder whose lease extends for twelve years to be held entitled to vote, and one whose lease extends for eleven years not to be so held entitled? How can any leaseholder offering to vote take the oath provided by section 311, that his lease extends for the period of time within which the debt to be incurred or the money to be raised by the by-law is made payable?

A vote taken on such a by-law as this would not necessarily represent the sense of those entitled to vote if the by-law had followed the provisions of the statute.

I do not think that the applicant has by voting *against* the by-law, so concurred in the irregularities of which he complains as to be held disentitled to apply to the Court to quash it; nor, I fear, does the fact that he must be deemed to have known the law and the defects in the by-law from the time that he read the proposed by-law and the notice given by the reeve, up to the time that he, without making any protest, took his chances and voted against it, furnish any reason why he should not have his costs.

It appears from the material filed that the benefits which would have accrued to the township by the voting of the small sum of money granted by this by-law (and which benefits seem to have been secured through the efforts of the president of the harbour company) were considerable, being (1) the expenditure by the harbour company of an amount equal to that voted by the township in the reconstruction of the harbour, and (2) the expenditure by the Government of a sum sufficient to dredge out the channel leading to the harbour.

Nevertheless, the by-law must be quashed with costs.

END OF VOL. XVII.

A DIGEST
OF
ALL THE CASES REPORTED IN THIS VOLUME
BEING DECISIONS IN THE
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ARBITRATION AND AWARD.

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ASSESSMENT AND TAXES.

1. *Distress for taxes — Legal assessment — Delivery of roll to collector — Return of roll by collector — Appointment of collector — Declaration*

ation of office—Demand of taxes—R. S. O. ch. 193, secs. 12, 120, 132, 133.]—The defendant, as collector of taxes of a village for the year 1886, on the 9th January, 1888, seized goods of the plaintiff as a distress for taxes assessed against the plaintiff upon the assessment roll for 1886. The plaintiff brought this action of replevin to recover the goods so seized.

(1) *Held*, upon the evidence, that it was not shewn that the plaintiff was not duly and legally assessed for the taxes in respect of which the distress was made.

(2) Sec. 120 of the Assessment Act, R. S. O. ch. 192, provides that the clerk shall deliver the roll to the collector on or before the 1st day of October, or such other day as may be prescribed by a by-law of the local municipality; but no by-law was passed, and the roll for 1886 was not delivered by the clerk to the defendant until about the 1st January, 1887.

Held, that the provisions of sec. 120 are directory, and not imperative; and the omission to deliver the roll within the prescribed time had not the effect of preventing the collector from proceeding to collect the taxes mentioned in the roll as soon as it was delivered to him, or of rendering such proceedings invalid.

(3) Sec. 132 of the Act provides that every collector shall return his roll to the treasurer on or before 14th December in each year, or such day in the next year, not later than 1st February, as the council may appoint; and sec. 133 provides that in case the collector fails to collect the taxes by the day appointed, the council may by resolution authorize the collector, or some other person in his stead, to continue the levy and collection. On 11th December,

1886, (before the roll was delivered to the collector) the council passed a resolution that the collector proceed at once to collect the taxes for 1886; on 7th March, 1887, another resolution instructing P. B. (the defendant), to enforce the payment of the uncollected taxes at once; on 14th November, 1887, a resolution that P. B., collector, be instructed to have the roll for 1886 returned by the 24th inst.; and on the 17th January, 1888, (after the distress and before the replevy) a resolution that the time for the collection of the unpaid taxes for 1886 be extended until 15th February, 1888, and that P. B. be authorized to collect until that date. The roll for 1886 remained in the hands of the defendant from the time of the delivery of it to him until after the distress and replevy.

Held, that the defendant was either the collector within the meaning of sec. 132 when he made the distress, and having the roll still in his hands unreturned was authorized to make it, following *Newberry v. Stephens*, 16 U. C. R. 65; or he was a person authorized as collector, or in the stead of the collector, by the resolutions of the council to continue the levy and collection under sec. 133, which provides no limit of time in such case; and in either case the distress by him was valid.

(4) By by-law providing for the assessment and levying of rates for 1885, passed by the council on 11th December, 1885, the defendant was appointed collector to collect the rates for 1885. On the 23rd December, 1886, the defendant entered into a bond with sureties as collector to the corporation of the village, which recited that he had been appointed collector; and on the same day a resolution was passed by the

council that the bonds of P. B. as collector be accepted, as presented to the council; but no other appointment of the defendant as collector was proved, and the defendant swore that he did not think he made any declaration of office for any year.

Held, that the effect of the defendant not having made and subscribed the declaration required by sec. 271 of the Municipal Act, R. S. O. ch. 184, was not to make his acts void; and having been duly appointed by by-law collector, he held office until removed by the council, even if what was done by the council on the 23rd December, 1886, did not constitute a good appointment.

(5) *Held*, also, that the appointment in December, 1887, of another person to collect the rates for 1887 had not the effect of removing the defendant from office; for it was an appointment to collect the rates for that year only, and by sec. 12 of the Assessment Act the council might appoint such number of collectors as they might think necessary; but even if it had that effect, the roll for 1886 had not been returned by the defendant, and the resolution of the 17th January, 1888, authorized him to continue the collection under sec. 133, and legalized the distress then made.

(6) It was proved that the defendant on the 11th January, 1887, duly demanded the taxes distrained for.

Held, that this demand was sufficient to warrant the distress, and the fact that the defendant several times afterwards demanded the same taxes did not affect the validity of the first demand, which was the only one required. *Lewis v. Brady*, 377.

2. *Tax sale—Neglect of duties by clerk and assessor under R. S. O.*

(1877) ch. 180, sec. 109—*Curative effect of R. S. O. (1887) ch. 180, secs. 155, 156.*—In 1882 a lot of land in the village of F., assessed for 1879 as "non-resident," was sold for the taxes of the latter year, the treasurer's deed therefor being executed in 1883.

In an action of ejectment brought by the purchaser against the original owner in 1888, it appeared that in 1882 the list of lands liable to be sold for arrears of taxes required by sec. 108, R. S. O. (1877) ch. 180, and which contained the lot in question, was sent by the treasurer to the clerk of the village, but that it had been lost, and although the land was occupied at the time, it was not returned "as occupied," nor was the owner notified that it was liable to be sold for taxes as provided for by sec. 109, (1877), ch. 180.

Held, [Boyd, C., dissenting,] that the sale was invalid, and that notwithstanding the lapse of time these defects were not cured by secs. 155 or 156, R. S. O. (1877) ch. 180.

Per PROUDFOOT, J.—The want of notice to the defendant of the arrears and of the liability of his land to be sold for them was the want of an essential requisite to the power of sale.

Per FERGUSON, J.—The land having become occupied, and having sufficient distress on it to satisfy the taxes, should, notwithstanding the errors of the municipal officers, be considered as if it had been returned "occupied," and the sale under such circumstances being forbidden by sec. 130, R. S. O. (1877) ch. 180, was not cured by sec. 156 of that statute.

Per BOYD, C.—The omission to raise within the proper time the objection that sec. 109, R. S. O. (1877) ch. 180, was not complied with, is cured by sec. 156; that section being

in the nature of a statute of limitations as to such objection.

Decision of *MACMAHON, J.*, affirmed.—*Dalziel v. Mallory*, 80.

3. Sale of land for taxes—Purchase by wife of treasurer who conducted sale—Sale and conveyance void—Fraud—R. S. O. ch. 193, sec. 189.]—

A purchase of land at a tax sale was made nominally by one G. for the plaintiff, but was in reality made with the money and for the benefit of the plaintiff's husband, the treasurer of the county, who conducted the sale.

Held, in an action of trespass, that the treasurer's position absolutely debarred him from becoming a purchaser at the sale, and the sale and conveyance to the plaintiff were void; and as the land remained in the hands of the person guilty of the original fraud, the sale was not cured by the provisions of R. S. O. ch. 193, sec. 189, although it took place in 1883, and the action was not brought till 1889. *Mooney v. Smith*, 644.

4. Exemptions—Sec. 3, 51 Vic. ch. 29(O.)]—By sec. 3 of the Assessment Amendment Act, 51 Vic. ch. 29 (O.), which came into force on August 1st, 1888, sec. 7 of the Assessment Act, R. S. O. ch. 193, was amended by adding to the exemptions: "All horses, etc., owned and held by any owner or tenant of any farm, and when carrying on the general business of farming or grazing." The defendant township was instituted under the Municipal Institutions Act for Algoma, Muskoka, etc., R. S. O. ch. 185, sec. 20 of which provided for the making of an assessment roll, which said roll, by sec. 28, when finally revised, was to be the roll of the municipality until a new roll was made, the council by sec. 29 to fix

the time for making the subsequent roll at periods of not less than one nor more than three years, and the year for the purposes of the Act was to commence on 1st January thereof; and by sec. 364 of the Mun. Act, R. S. O. ch. 184, the rates or taxes were to be considered as imposed on and from 1st January, and end with 31st December, unless otherwise provided. By sec. 30 the council might in each year after the final revision of the roll pass a by-law levying a rate on all the real and personal property, etc. The assessment for the year 1888 was made in the months of March and April, and the roll was returned to the clerk of the municipality on or about 1st May, and was finally revised by the council sitting as a Court of Revision on 16th June. On 4th of August a by-law was passed directing a rate to be levied to meet the current expenses for the year.

Held, under the circumstances, the personal property mentioned was not exempt for the year 1888. *Henderson et al. v. The Corporation of the Township of Stisted*, 673.

See CONSTITUTIONAL LAW, 2.—MUNICIPAL CORPORATIONS, 2, 3.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

See BANKRUPTCY AND INSOLVENCY.—EXECUTION.—FRAUDULENT PREFERENCE.

ATTORNEY-GENERAL.

See CRIMINAL LAW, 5—TRUSTS AND TRUSTEES, 3.

BAIL.

Discharge — Action on recognizance — Surrender of principal — Notice of surrender — Exoneretur — Bail relieved on terms — Amount of recovery against bail — Rules 1062, 1064, 89.]—The defendants were special bail for one S. upon a recognizance in an action by the plaintiffs against S.

The proceedings in the original action were begun and carried on in the county of Middlesex, and the condition of the recognizance was that S. would, if condemned, satisfy, &c., or render himself to the custody of the sheriff of Middlesex; or the cognizors, the present defendants, would do so for him.

R.S.O. 1877 ch. 50, sec. 40 (now Rule 1062) provides for the render of the defendant to the sheriff of the county in which the action against such defendant has been brought; and sec. 42 of the same Act (now Rule 1064) provides that special bail may surrender their principal to the sheriff of the county in which the principal is resident or found, and that upon proof of due notice to the plaintiff of the surrender, and production of the sheriff's certificate thereof, a Judge shall order an exoneretur to be entered on the bail-piece, and thereupon the bail shall be discharged.

The defendants on the 7th February, 1888, rendered S. to the sheriff of Norfolk, S. being found in that county, and obtained from the sheriff a certificate of such render but obtained no order for the entry of an exoneretur. The writ of summons in this action upon the recognizance was served on the defendants on the 10th of April, 1888, and on the 16th April, 1888, the defendants served

on the plaintiffs a notice of the render of S. to the sheriff of Norfolk.

Held, that the bail were not entitled to be discharged, and that the plaintiffs were entitled to bring this action upon the recognizance, because no order for an exoneretur had been obtained, notwithstanding the notice of render; but that, the substantial duty of rendering the principal having been performed, the defendants should be relieved upon terms.

The Court ordered that upon the defendants filing an order for an exoneretur within two weeks and paying the costs of the action within ten days after taxation, the judgment for the plaintiffs should be set aside and all further proceedings stayed; otherwise judgment to be entered for the plaintiffs with costs.

Held, also, that under Rule 89 of T. T. 1856 (now Rule 1085), the liability of bail is limited to the amount of their recognizance; and the plaintiff having recovered in the original action the whole sum sworn to in the affidavit of debt, his recovery against the bail should not in any event be more than the former amount. *Laing et al. v. Slingerland et al.*, 392.

BANKRUPTCY AND INSOLVENCY.

Assignment to one other than sheriff — Consent of creditors — Subsequent assignment to sheriff.]—It is sufficient under R. S. O. 1887 ch. 124, sec. 3, sub-sec. 5, if the consent of creditors to an assignment is given subsequently to the assignment being made, provided that it is given before any assignment is made to the sheriff of the county. *Hall v. Fortye*, 435.

See CONSTITUTIONAL LAW, 2 — EXECUTION.

BANKS AND BANKING.

1. *Cheque—Marking “good” by bank—Effect of, when payment not demanded—Discharge of drawer.*—The payees of a cheque took it to the bank on which it was drawn on the afternoon of the day on which they received it from the drawer and got it marked “good,” the amount being charged to the drawer’s account. They then took it away without demanding payment. The bank on the evening of the same day suspended payment, and on the following day, on presentation of the cheque payment was refused.

Held, that the drawer of the cheque was discharged from all liability thereon. *Boyd et al. v. Nasmith*, 40.

2. *Company—Winding-up—Contributories—Liquidators—Illegal trafficking in shares—Transfers within one month of suspension—R. S. C. ch. 120, secs. 45, 77—R. S. C. ch. 129, sec. 45.*—H., having been placed on the list of contributories in the winding-up proceedings of the Central Bank, appealed on the ground that the transfer of his shares was a fraudulent transaction, in view of R. S. C. ch. 120, sec. 45, since the bank was trafficking in its own shares for the purpose of keeping up the appearance of *bonâ fide* sales, and so enhancing the market price of its shares, and took the appellant’s notes in payment for his shares, undertaking not to enforce them but to deliver them up upon a re-sale being effected, which transactions were *ultra vires* of the bank.

Held, that this was no defence as against the liquidators, who represented the creditors as well as the bank.

H. also appealed as to certain of

the shares upon the ground that he had acquired them within one month before the suspension of the bank, and also on the ground that those who had transferred these shares to him should also have been placed on the list of contributories, though they themselves had only acquired the shares within the said month.

Held, that H. was rightly on the list as to these shares, but that his transferors should also be placed upon it, and the report was referred back to the Master for this purpose, although the liquidators had not excepted to the report.

Liquidators are officers of the Court, and the matter being brought to the notice of the Court on the appeal, it was the duty of the Court to protect the interest of the creditors and all parties concerned, and to see that all were charged who were legally chargeable. *Re Central Bank—J. D. Henderson’s Case*, 110.

3. *Company—Winding-up—Proof of claim—Cheque accepted by bank after suspension—Set-off—Subsequently accruing liability of drawer of cheque—Fraudulent preference—R. S. C. ch. 129—Creditor proving claim after time—Ex debito justitiæ.*—On November 15th, 1887, the day before the suspension of the Central Bank, one D., having sufficient funds to his credit, drew a cheque upon it payable to C., who deposited the same in the Dominion Bank, and obtained an advance upon it, and the Dominion bank claimed upon it in the winding-up proceedings, having presented it for payment on November 17th, when, however, the Central Bank had suspended payment. On November 23rd, 1887, the Central bank marked the cheque good, debiting D.’s account and crediting the Dominion Bank with the amount

thereof. Afterwards, however, the liquidators claiming the right to set off certain subsequently accruing liabilities of D. against the cheque, the Dominion Bank withdrew their claim upon it, and the Master in Ordinary disallowed it. Subsequently, and after the first dividend had been paid, C. heard of this, and filed a claim on the cheque on September 13th, 1887. The Master, however, held that the time for filing claims having elapsed, he had a discretion as to allowing the claim, and allowed it only subject to the said set-off.

Held, that there was no right to set off as claimed, and that the allowance of the claim was *ex debito iustitiæ*, and not discretionary.

The fact of the Central Bank having accepted the cheque, and credited the amount to the Dominion Bank, and charged the amount to D. shewed conclusively that at that time the Central Bank was not a creditor of D.; nor did the case come within the meaning of any of the clauses in the Winding-up Act relating to fraudulent preferences. *Re Central Bank—Gayley's Case*, 122.

4. *Mortgage—Renewal notes—Warehouse receipts—Negotiation—R. S. C. ch. 120, sec. 53, sub-sec. 4.*—Where a bank, holding a mortgage as additional security for the payment of certain notes, substitutes for these notes renewals from time to time, without, however, receiving actual payment, the whole series of notes and renewals form links in one and the same chain of liability, which is secured by the mortgage, although, as a matter of book-keeping, the bank may have treated the first notes and the subsequent substituted notes as paid by the application of the proceeds from time to time of the renewals.

The simple renewal of notes by a bank is not a "negotiation" within the meaning of sec. 53, sub-sec. 4, of the Bank Act, R. S. C. ch. 120, so as to validate a warehouse receipt taken as collateral security therefor, no such new advance being made, and no such valuable consideration being given or surrendered contemporaneously by the bank as would represent the inception of a new transaction, and no change being wrought in the condition of the parties except the mere giving of time. *Dominion Bank v. Oliver et al.*, 402.

5. *Deposit receipts—Negotiability—Estoppel—Bank Act, R. S. C. ch. 120, secs. 43, 65.*—An incorporated bank, by its cashier, issued deposit receipts in the following form: "Received from — the sum of \$—, which this bank will repay to the said — or order, with interest at four per cent. per annum, on receiving fifteen days' notice. No interest will be allowed unless the money remains with this bank six months. This receipt to be given up to the bank when payment of either principal or interest is required."

Held, that it was competent under the Banking Act, R. S. C. ch. 120, to issue such deposit receipts, and that even if they did not possess all the incidents of promissory notes, yet being meant to be transferred by indorsement, they were so far negotiable as to pass a good title to a *bonâ fide* purchaser for value, taking without notice of any infirmity of title.

But *semble*, that these deposit receipts were negotiable instruments under which the holders were entitled to recover as upon a promissory note made by the bank.

Voyer v. Richer, 13 L. C. Jur. 213; 15 L. C. Jur. 122; L. R. 5 P. O. 461, specially referred to. *Re Central Bank—Morton and Block's Claims*, 574.

See CRIMINAL LAW, 5.

BARRISTER AND SOLICITOR.

Law Society — Barrister and solicitor — Professional misconduct — Exercise of disciplinary jurisdiction by Law Society—Constitution of Discipline Committee—Evidence under oath—R. S. O. ch. 145, sec. 36.—The plaintiff was cited before the Benchers of the defendant society and charged with professional misconduct; his case was referred to the standing committee of the Benchers on discipline, which consisted of nine members and the treasurer of the society, who was an *ex officio* member of all committees; the committee reported unfavorably to the plaintiff; their report was adopted by the general body of Benchers, who resolved that the plaintiff was unworthy to practise as a solicitor, and that he be disbarred as a barrister.

Held, by a Divisional Court, reversing the decision of BOYD, C., 16 O. R. 625, (FALCONBRIDGE, J., dissenting) that the report of the Discipline Committee and the proceedings of Convocation founded upon it were irregular because of the failure to notify the treasurer (although he was absent in Europe) of the meetings of the committee, and to notify the members of the committee generally of the particular business for which they were called together; and, as the form of the notice of the meetings was not known to the plaintiff, he could not be taken to have waived any right to object.

2. That by the provisions of R. S. O. ch. 145, sec. 36, the Legislature intended that the evidence in inquiries such as the one in question should be taken upon oath; and not to confer upon the defendants a discretion to take it upon oath or without oath as they should think proper; and they could not by arrangement between themselves and the plaintiff adopt a different mode of obtaining the facts than that which the Legislature prescribed in conferring their authority upon them. *Hands v. Law Society of Upper Canada*, 300.

BENCHER.

See BARRISTER AND SOLICITOR—LAW SOCIETY.

BENEVOLENT SOCIETY.

See INSURANCE, 2, 3.

BENEVOLENT SOCIETY ACT.

See INTOXICATING LIQUORS.

BILLS AND NOTES.

See CRIMINAL LAW, 2, 3, 5.

BREACH OF PROMISE OF MARRIAGE.

See HUSBAND AND WIFE, 2.

BY-LAW.

See MUNICIPAL CORPORATIONS, 1, 4, 5, 6, 7, 8—TAVERNS AND SHOPS.

CANADA TEMPERANCE ACT.

1. *Conviction of defendant in his absence—Proof of former convictions by certificate.*—The defendant, having been summoned for selling liquor contrary to the second part of the Canada Temperance Act, appeared with his counsel at the hearing and pleaded not guilty, when evidence was given for the prosecution justifying a conviction; but, at the defendant's request, an adjournment was granted. At the adjourned hearing, at which neither defendant nor his counsel appeared, evidence was given of the service of the summons and of the facts that transpired at the prior hearing, and certificates of two prior convictions were put in, and the identity of the defendant proved. The defendant was found guilty and convicted of a third offence against the said Act.

Held, that the defendant, having once had the opportunity to defend, could not, by his failure to appear at the adjourned hearing, defeat the administration of justice; and therefore he was properly found guilty in his absence.

Held, also, that the proof of the former convictions by the certificates was sufficient.

Regina v. Kennedy, 10 O. R. 396, at p. 402, not followed. *Regina v. Kennedy*, 159.

2. *Conviction without trial and in defendant's absence.*—The defendant, who was summoned to appear before the police magistrate on April 14th at F. for unlawfully selling liquor contrary to the Canada Temperance Act, instructed C. to go to W., where the police magistrate resided, to try and arrange the matter by paying such sums as should be demanded by the magis-

trate. On April 13th C. went to W. and settled the case by paying \$50, and at the same time C., without authority and without the paper having been read to him, signed in defendant's name, as his agent, an indorsement on the information, which stated that the information had been read over to the defendant, who pleaded guilty to the same. On April 14th the police magistrate at W., without holding any court or calling any witnesses in support of the charge, and without defendant being present, convicted him of the offence charged, and fined him \$50 and costs, drawing up a formal conviction, which was returned. Subsequently he returned another conviction for the same offence, reciting that the conviction was made on April 14th at F. by defendant admitting the charge.

Held, that under the circumstances the conviction could not be supported, and must be quashed. *Regina v. Edgar*, 188.

3. *Absence of defendant—Service on wife—Evidence of lapse of reasonable time between service and hearing.*—A summons was issued for selling liquor contrary to the Canada Temperance Act, which was served by leaving it with defendant's wife at his hotel. The defendant not appearing at the time and place mentioned in the summons for the hearing and on the constable proving on oath the manner in which the summons had been served, the Police Magistrate proceeded *ex parte* to hear and determine the case, and convicted defendant of the offence charged, and imposed a fine. At the time of the service of the summons the defendant was absent in the States as a witness at a trial there, and there was no evidence that his wife was

informed by the constable of the purport of the summons, while defendant stated that he knew nothing of the matter until four or five days after the conviction had been made, when he received a letter from his wife stating that some magistrate's papers had been left for him at the hotel.

Held, that under sec. 39 of R. S. C. ch. 178, there must in such cases be evidence before the magistrate that a reasonable time has elapsed between the service of the summons and the day appointed for the hearing, and there being no such evidence here, the magistrate acted without jurisdiction, and the conviction must be quashed.

Regina v. Ryan, 10 O. R. 254, overruled. *Regina v. Mabee*, 194.

4. *Application of fines*—48 Vic. ch. 48, sec. 2, (D.)—*Construction of orders in council—County and town.*—The Canada Temperance Act came into force in the united counties of L. and G. on 1st May, 1886. On 2nd June, 1886, the Parliament of Canada passed the Act 49 Vic. ch. 48; sec. 2 of which provided that the Governor in Council might from time to time direct that any fine, &c., which would otherwise belong to the Crown for the public uses of Canada, should be paid "to any provincial, municipal, or local authority which, wholly or in part, bore the expenses of administering the law under which such fine, &c., was enforced, or that the same should be applied in any other manner deemed best adapted to attain the objects of such law and to secure its due administration."

On 29th September, 1886, an order in council was passed directing that all fines, &c., recovered or enforced under the Canada Temperance Act

within any city or county which had adopted the Act, which would otherwise belong to the Crown for the public uses of Canada, should be paid to the treasurer of the city or county, as the case might be, for the purposes of the Act.

On the 15th November, 1886, a second order in council was passed directing that the first should be cancelled, and that all fines, &c., recovered or enforced under the Act within *any city or county or any incorporated town separated for municipal purposes from the county*, should be paid to the treasurer of the city, incorporated town, or county, as the case might be, for the purposes of the Act.

The town of B. was at the time the Act was brought into force an incorporated town separated from the counties of L. and G. for municipal purposes; and between the dates of the two orders in council the police magistrate of the town paid to the treasurer of the counties \$750, the amount of fines recovered and enforced by him for violations of the Canada Temperance Act within the town.

Held, STREET, J., dissenting, that, in the absence of any application by the treasurer of the counties of the money so paid to him, the town of B. was entitled to recover it from the counties. The passing of the second order in council was a complete revocation of the first, and the second was retroactive in the sense that it provided for the application of all fines, &c., theretofore recovered or enforced.

Per STREET, J.—The first order in council operated as a gift from the Crown to the municipality, with an intimation added as to the purpose to which it was expected the gift would be applied, but carrying with it no le-

gal obligation that it should be applied in any particular manner. It was a complete gift; the money was finally at home, so far as the Crown was concerned, when the municipality received it, and the revocation of the order could not revoke a completed transaction, nor retract that which had been actually done under it. *United Counties of Leeds and Grenville v. Town of Brookville*, 261.

5. *Voters—Repeal—Indians—Indian reserves*—*R. S. O. 1887 ch. 5, sec. 1—R. S. C. ch. 106, sec. 12.*—*Held*, that Indian electors resident in the township of Tuscarora, in the county of Brant, being an Indian reserve, had no right to vote upon the question of repeal of the Canada Temperance Act in that county.

Semble, that *R. S. O. 1887, ch. 5, sec. 1*, is to be interpreted as meaning that the townships named shall be townships for municipal purposes, when it becomes possible to make them such, as, *e. g.*, in such a case as the present, when the Indians become enfranchised.

The Canada Temperance Act can have no operation where the Indian Act is in force.

R. S. C. ch. 106, sec. 12, refers to white men, but not to Indians. *Re Metcalfe*, 357.

6. *Adjournment at close of evidence to consider judgment—Not restricted to one week—Commission of offence—Not necessary to allege by servant or agent—Lease—Proof of.*—Where at the conclusion of the evidence, on a charge of selling liquor contrary to the Canada Temperance Act, the magistrate reserves his judgment, for the purpose of reaching a decision or of considering the amount of the penalty, he is not restricted to the one week mentioned in *sec. 48* of *R. S. C. ch. 178*.

Regina v. Hall, 12 P. R. 142, followed.

It is not necessary to charge that the offence was committed through the instrumentality of a clerk, servant, or agent, as the defendant is guilty under section 100 of the Canada Temperance Act, *R. S. C. ch. 106*, and liable to the penalties imposed, if the offence is committed by himself or any one within the class of persons above mentioned.

At the trial a lease from defendant to one J. was put in and the execution proved by a witness, of two rooms in defendant's hotel, being where the bar was kept and liquor sold, but neither defendant nor J. appeared as a witness at the trial, and there was no evidence as to its *bona fides*.

Held, that this was a matter for the magistrate, and as he had found against it the Court could not interfere. *Regina v. Alexander*, 458.

CASES.

Acre v. Livingstone, 24 U. C. R. 282, not followed.]—*See DEED*.

Adams v. Loomis, 24 Gr. 242, considered.]—*See HUSBAND AND WIFE*, 1.

Adams v. The Kensington Vestry, 27 Ch. D. 394, specially referred to and followed.]—*See WILL*, 4.

Re Croskery, 16 O. R. 207, 209, referred to.]—*See DOWER*, 2.

Davis v. Shenstone, 11 App. Cas. 187, referred to.]—*See DEFAMATION*.

Re Diggle, Gregory v. Edmondson, 39 Ch. D. at p. 257, specially referred to and followed.]—*See WILL*, 4.

Goddard v. Coulson, 10 A. R. 1, followed.]—See LIEN.

Re Hall-Dare's Contract, 21 Ch. D. 41, considered.]—See DOWER, 2.

Hands v. Law Society of Upper Canada, 16 O. R. 625, reversed.]—See BARRISTER AND SOLICITOR.

Kirkstall Brewing Co. v. Furness R. W. Co., L. R. 9 Q. B. 468, followed.]—See RAILWAYS AND RAILWAY COMPANIES, 8.

Knowlden v. The Queen, 5 B. & S. 532, followed.]—See CRIMINAL LAW, 5.

Re Konkle, 14 O. R. 183, considered.]—See HUSBAND AND WIFE, 1.

Lee v. Abdy, 17 Q. B. D. 309, followed.]—See INSURANCE, 4.

Lefroy v. Burnside, 4 L. R. (Ireland) 556 referred to.]—See DEFAMATION.

Moran v. Palmer, 13 C. P. 358, not followed.]—See JUSTICE OF THE PEACE, 2.

Murphy v. Corporation of Ottawa, 13 O. R. 334, distinguished.]—See MASTER AND SERVANT.

Newberry v. Stephens, 16 U. C. R. 65, followed.]—See ASSESSMENT AND TAXES, 1.

Purser v. Bradburne, 7 P. R. 18, distinguished.]—See PROHIBITION.

Regina v. Fennell, 7 Q. B. D. 147, followed.]—See CRIMINAL LAW, 4.

Regina v. Hall, 12 P. R. 142, followed.]—See CANADA TEMPERANCE ACT, 6.

Regina v. Hall, 8 O. R. 407, distinguished.]—See MEDICAL PRACTITIONER.

Regina v. Kennedy, 10 O. R. 396, at p. 402, not followed.]—See CANADA TEMPERANCE ACT, 1.

Regina v. Ryan, 10 O. R. 254, overruled.]—See CANADA TEMPERANCE ACT, 3.

Regina v. Smith, 7 P. R. 429, followed.]—See PARTITION.

Rex v. Danger, Dears & B. C. C. 307, followed.]—See CRIMINAL LAW, 2.

Riordan v. Willox, 4 Times L. R. 475, referred to.]—See DEFAMATION.

Roberts v. McDonald, 15 O. R. 80, overruled.]—See LIEN.

Sinclair v. McDougall, 29 U. C. R. 388, specially referred to.]—See EXECUTION.

Trigerson v. Board of Police of Cobourg, 6 O. S. 405, not followed.]—See JUSTICE OF THE PEACE, 4.

Voyer v. Richer, 13 L. C. Jur. 213; 15 L. C. Jur. 122; L. R. 5 P. C. 461; specially referred to.]—See BANKS AND BANKING, 5.

Re Watson and Woods, 14 O. R. 48, distinguished.]—See WILL, 7.

OERTIORARI.

See JUSTICE OF THE PEACE.

CHattel MORTGAGE.

See FRAUDULENT PREFERENCE—MORTGAGE, 2—PARTNERSHIP.

CHEQUE.

See BANKS AND BANKING, 1, 3.

CLUB.

See INTOXICATING LIQUORS.

COLLATERAL SECURITY.

See COMPANY, 3.

COLLECTOR OF TAXES.

See ASSESSMENT AND TAXES, 1.

COMMON CARRIER.

See CONTRACT, 3.

COMPANY.

1. *Shareholder — Misrepresentation — Rescission of contract for shares.*—In an action by a shareholder of an investment association to have it declared that his subscription for shares had been obtained by fraud and misrepresentation, and that it was not binding upon him, and for other relief, it appeared that in 1882 the said association had amalgamated with a loan society, and under the terms of the amalgamation the shareholders in the latter became entitled, on payment of a premium of 17 per cent., to an equivalent number of shares of the former.

It was thus the plaintiff became entitled to his shares in the association, having previously been a shareholder in, and manager of, the loan society; and he was an assenting

party to the amalgamation, which he now attacked as *ultra vires*, and brought about by misrepresentation and fraud. But it was proved that there were many material misrepresentations, falsely and fraudulently made, in a certain report of the association dated December 31st, 1888, which had been an important factor in bringing about the assent to the amalgamation by the society, and in inducing the plaintiff to subscribe for the shares in the association, and that the plaintiff had not become aware of their falsity until shortly before bringing this action. After the amalgamation the association borrowed large sums of money upon debentures, etc., on the faith of the apparently existing state of affairs, but it was not shewn that the association was insolvent, or on the eve of insolvency.

Held, that the plaintiff was entitled to a rescission of the contract made by his subscription for stock in the association.

Held, also, that the fact of the plaintiff having sold some of his shares would not prevent rescission as to the remainder of them. *Nelles v. The Ontario Investment Association*, 129.

2. *R. S. O. ch. 157—Stock—Subscription—Contributory—Allotment.*—By sec. 2, sub sec 6, of the Ontario Joint Stock Companies Letters Patent Act, "shareholder" means "every subscriber to or holder of stock in the company."

After incorporation of a company under the above Act, R. S. O. ch. 157, the appellant signed a share subscription book with the following heading: "We the undersigned do acknowledge ourselves to be subscribers to the capital stock of the company for the number of shares

and the amount set opposite our names; and we do hereby covenant, promise, and agree, each with the other of us * * to pay the amount of said subscriptions and all calls thereon, when and as the same may be called up under the provisions of the Joint Stock Act, or under any by-law which may be passed." No stock was ever allotted to the appellant, and in winding-up proceedings he disputed his liability as a contributory.

Held, that the above formed a complete and absolute engagement with the company and the other signatories, and bound the appellant.

Semle. Had no stock been given to the signers of the above agreement, they could have enforced it specifically. *Re Zoological and Acclimatization Society of Ontario*, 331.

[Reversed in Court of Appeal.]

3. *Winding-up Act—Necessity for liquidators to sue by order of Court—Objection made too late—Mortgage received as collateral security—Production of, before judgment entered.*]—Action by plaintiffs to recover the price of an implement manufactured by them. A winding-up order had previously been obtained against plaintiffs, and a liquidator appointed. An objection was taken at the trial after the evidence had been given, that the action should have been brought in the name of the liquidator and with the approval of the Court, under sec. 31 of R. S. C. ch. 129. The order authorizing the liquidator to sue either in his own name or in that of the plaintiff was put in after the hearing.

Held, that the objection was too late and must be overruled.

Semle, the proper course is to

move in Chambers to dismiss the action for want of authority to sue; and *semle* also as the plaintiffs under the statute had power to sue, they could do so without the authority of the Court, if they chose to run the risk of costs.

The plaintiffs had obtained a mortgage from one of the defendants as collateral security for the debt, which they had assigned to a bank. The Court directed that judgment was to be entered for the plaintiffs only on the production of the mortgage, and a reconveyance or discharge thereof to the mortgagor. *Sarnia Agricultural Implement Manufacturing Company (Limited) v. Hutchinson*, 676.

See BANKS AND BANKING, 2, 3.—FOREIGN JUDGMENT, TRUSTS AND TRUSTEES, 3.

COMPENSATION.

See MUNICIPAL CORPORATIONS, 2, 3.—RAILWAYS AND RAILWAY COMPANIES, 6.

CONFESSION.

See CRIMINAL LAW, 4.

CONSTABLE.

See JUSTICE OF THE PEACE, 2.—CORONER.

CONSTITUTIONAL LAW.

1. 51 *Vic. ch. 32 (O.)—Ultra vires—B. N. A. Act, sec. 91, para. 27—"Criminal law."*—*Held*, STREET, J., dissenting, that

the Act of the Ontario Legislature, 51 Vic. ch. 32, "an Act to provide against frauds in the supplying of milk to cheese or butter manufactories," is *ultra vires*, as coming within the class of "criminal law" reserved exclusively to the Parliament of Canada by the B. N. A. Act, sec. 91, para. 27.

Per ARMOUR, C. J.—The primary object of this Act is to create new offences and punish them by fine, and in default of payment by imprisonment, and this is its true nature and character.

Per STREET, J.—The punishments imposed by the statute are directed to the enforcement of a law of the Provincial Legislature relating to property and civil rights in the Province; the offences created by it formed no part of the criminal law previously existing, and the apparent object is to protect private rights, rather than to punish public wrongs. *Regina v. Wason*, 58.

2. *Insolvency legislation—Powers of Dominion Parliament—33 Vic. ch. 40 (D.)—Intra vires—B. N. A. Act, sec. 91, sub-sec. 21—Assessment and taxes—Exemption from taxation—R. S. O. ch. 193, sec. 7, sub-sec. 1.]—Held*, that the statute 33 Vic. ch. 40 (D.), which recites the insolvency of the Bank of Upper Canada, vests the property of the insolvent estate in the Crown as trustee for the creditors, and provides for its realization in order that the debts may be paid, is within the powers of the Dominion Parliament, under sub-sec. 21 of sec. 91 of the B. N. A. Act; and that, although the interest of a mortgagor could, that of the Crown, acquired under such Act, as mortgagee of certain lands, could not, be sold for arrears of taxes, being exempt from taxation under R. S. O. ch. 193, sec. 7, sub-sec. 1.

Decision of ROBERTSON, J., varied. *Regina v. County of Wellington et al.*, 615.

See EXECUTION.

CONTRACT.

1. *Election to sue one of two persons—Evidence as to whom credit given under a contract.]—*The defendant D., after some correspondence with plaintiffs as to an advertising contract for the Union Medicine Co., had an interview with plaintiffs as to entering into same. A contract had been drawn up by plaintiffs in expectation that it would be made by the company, but on ascertaining that the company was not incorporated, it was at plaintiffs' request signed by D., and the entry in plaintiffs' books was "G. A. Devlin, Toronto, Union Medicine Advertising Contract." The first and second payments were made by D., but on the third payment coming due, he stated his desire not to make it, as it might prejudice a claim he had against G., his partner, with whom he had a dispute about the partnership affairs, whereupon plaintiffs saw G., and on his stating that it was D.'s business to pay this account, the plaintiffs sued D., and moved for judgment under Rule 80, O. J. Act, stating in their affidavit in support of the motion that "the claim was under an agreement made between the parties," etc., and that "the defendant," D., "was and still is justly and truly indebted to the plaintiffs in respect of the matters above set forth." D. put in an affidavit in answer, in consequence of which G. was made a party defendant, and the case proceeded to trial.

Held, that on the evidence the

credit under the contract was given to D. alone; but, even treating D. as an agent for an undisclosed principal, namely for G. as one of the firm, and therefore that G. might be jointly liable with D., the plaintiffs were bound to elect whether they looked to D. or the firm, and that there was a binding election not to treat the firm as liable, but to rely on the individual liability of D. *The Mail Printing Company v. Devlin and Graham*, 15.

2. *Agreement — Power of those for whose benefit it is made to enforce same—Release.*—In consideration of a conveyance to him of a certain farm, the petitioner agreed with his mother that he would during her life provide her with a house on the farm, and with necessaries, and support his brothers and sisters thereon until they reached sixteen years of age, so long as they remained at home on the said farm, and assisted him so far as they were able in the management of it.

Held, that the mother had no right or power to release the petitioner from the obligations undertaken by him with reference to his brothers and sisters under the above agreement, and if the children did their part they could hold their brother to his promise, though the agreement was not in terms made with them as parties. *Re McMillan*, 344.

3. *Telephone Company—Messenger business—Agreement as to transmission of orders for messengers—Other telephone subscribers' rights—Construction of agreement.*—The defendants were a company carrying on a general telephone business with a central office to connect subscribers' telephones, and in addition carried on a messenger busi-

ness for the purpose of delivering letters, messages, &c. By an agreement the defendants assigned their messenger business to the plaintiffs and covenanted that they would not transmit or give directly or indirectly any messenger order to any person except the plaintiffs, and that they would cease to do such business. The G. N.W. Telegraph Co., (one of the defendants' telephone subscribers,) subsequently opened an office for a messenger business, and applied for a telephone in the usual way, which the defendants supplied them with, and by means of it the G. N. W. Telegraph Co. received orders for messengers, &c.

Held, that the defendants did not transmit or give messenger orders when they placed a subscriber in communication (through the central office) with the G. N. W. Telegraph Co., that they only afforded him a medium by which to transmit or give his own order, which was a case not provided for by the agreement, and the action for an injunction to restrain defendants was dismissed with costs. *The Electric Despatch Company v. The Bell Telephone Company of Canada*, 495.

See COMPANY, 1, 2—LIEN—RAILWAYS AND RAILWAY COMPANIES, 7.

CONTRIBUTORIES.

See BANKS AND BANKING, 2—COMPANY, 2.

CONVERSION.

See CRIMINAL LAW, 5—TIMBER.

COPYRIGHT.

1. *British—Canadian—R. S. C. ch. 62—Importation of works—Prior*

Canadian copyright.—There is a very clear distinction to be observed in the Copyright Act, R. S. C. ch. 62, between works which are of prior British copyright and those which are of prior Canadian copyright. If there is a prior British copyright, and thereafter Canadian copyright is obtained by the production of the work, then, by section 6, that local copyright is subject to be invaded by the importation of lawful British reprints.

But if the Canadian copyright is first on the part of the author or his assigns, then, under section 4, the monopoly is secured from all outside importation.

The Imperial Parliament has sanctioned and reiterated colonial legislation whereby the possessor of a prior Canadian copyright is secured completely against all interference to the territorial extent of the Dominion, even as against English reproductions or copies made under a subsequent British copyright. *The Anglo-Canadian Music Publishers' Association (Limited) v. I. Suckling & Sons*, 239.

2. *Neglect of author to deposit copy, etc.*—*Right to proceed for infringement—Railway ticket—Subject of copyright.*—Sec. 5 of the Con. Stat. C. ch. 81 is merely directory, and so the neglect of the author of a work to deposit a copy thereof in the library of Parliament does not incapacitate him from proceeding for an infringement of it.

A railway ticket is not a subject of copyright under the said Act. *Griffin et al. v. Kingston and Pembroke R. W. Co.*, 660

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CORONER.

Coroner—Inquisition—Statement of holding inquest—Identification of body—Constable acting as juror and witness.—The caption to an inquisition finding the prisoners guilty of murder, stated that the inquest was held at H., etc., on the 11th and 15th days of January, in the 51st year of the reign of Her Majesty Queen Victoria, and the inquisition to be "an inquisition indented, taken for our sovereign lady the Queen," etc., in view of the body of an infant child of A. W. (one of the prisoners) then and there lying, and and upon the oath of" (giving the names of jurors) "good and lawful men of the county, and who being then and there duly sworn and charged to enquire for our said lady the Queen, when, where, how, and by what means the said female child came to her death, do upon their oaths say," etc.

Held, that the statement of the time of holding the inquest was sufficient; that it sufficiently appeared that the presentment was under oath; and that it need not be under seal; that there was a sufficient finding of the place where the alleged murder was committed; and of identification of the child murdered with that of the body of which the view was had.

L., the constable to whom the coroner delivered the summons for the jury, was at the inquest sworn in as one of the jury, and was sworn and gave evidence as a witness; and Y., a jurymen, was also sworn and gave evidence as a witness.

Held, that the fact of L. being such constable did not preclude him from being on the jury, nor did either of such positions preclude him from giving evidence; and so also Y. was not precluded. *Regina v. Winegarner*, 208.

COSTS.

Applicant to quash by-law entitled to, where he voted against it.—See MUNICIPAL CORPORATIONS, 8.

Of reference and award—Fire insurance—R. S. O. 1887, ch. 167, sec. 114.—See INSURANCE, 1.

Of action induced by conduct of defendants' officers.—See INSURANCE, 2.

Of conviction.—See JUSTICE OF THE PEACE, 4.

Of quashing summary conviction given against private prosecutor.—See MEDICAL PRACTITIONER.

Refused to successful plaintiffs because objections not taken earlier.—See PUBLIC SCHOOLS, 1.

Refused to successful defendant on account of discreditable conduct.—See MUNICIPAL CORPORATIONS, 5.

Out of estate except costs occasioned by charges of fraud and collusion.—See WILL, 3.

None, in action for dower where no previous demand.—See DOWER, 1.

Of commitment.—See INDIAN LANDS.

See also COMPANY, 3—TIMBER.

COUNTER-CLAIM.

See EJECTMENT.

CREDITORS RELIEF ACT.

See EXECUTION.

CRIMINAL LAW.

1. *Rape on daughter—Evidence of.*—The defendant was indicted and convicted for committing a rape on his daughter. The learned Judge left it to the jury to say whether on the evidence the act of connection was consummated through fear, or merely through solicitation.

Held, that the question was one of fact entirely for the jury, and could not have been withdrawn from them, there being ample evidence to sustain the charge, and it having been left to them with the proper direction in such a case. *Regina v. Cardo*, 11.

2. *False pretences—Contract to pay money—Giving promissory note instead of money—Valuable security.*—The defendant, by untrue representations, made with knowledge that they were untrue, induced the prosecutor to sign a contract to pay \$240 for seed wheat. The defendant also represented that he was the agent of H., whose name appeared in the contract. H. afterwards called upon the prosecutor and procured him to sign and deliver to him a promissory note in his H.'s, favor for the \$240. The contract did not provide for the giving of a note, and when the representations were made the giving a note was not mentioned. The prosecutor, however, swore that he gave the note because he had entered into the contract.

The defendant was indicted for that he, by false pretences, fraudulently induced the prosecutor to write his name upon a paper so that it might be afterwards dealt with as a valuable security; and upon a second count for, by false pretences, procuring the prosecutor to deliver to H. a certain valuable security.

Held, upon a case reserved, that the charge of false pretences can be sustained as well where the money is obtained or the note procured to be given through the medium of a contract, as when obtained or procured without a contract; and the fact that the prosecutor gave a note instead of the money, by agreement with H., did not relieve the prisoner from the consequences of his fraud; the giving of the note was the direct result of the fraud by which the contract had been procured; and the defendant was properly convicted on the first count as being guilty of an offence under R. S. C. ch. 164, sec. 78; but

Held, that the note before it was delivered to H. was not a valuable security, but only a paper upon which the prosecutor had written his name so that it might be afterwards used and dealt with as a valuable security; and the conviction of the defendant upon the second count could not stand.

Rex v. Danger, Dears. & B. C. C. 307, followed. *Regina v. Rymal*, 227.

3. *Inducing note to be signed by false pretences—Evidence of similar frauds on others—Admissibility.*—The defendant was indicted in the first count of the indictment for obtaining from one H. a promissory note with intent to defraud, and in the second count with inducing H. to make the said note with like intent. The evidence shewed that on May 4, 1887, the defendant's agent called on H., and obtained from him an order addressed to defendant to deliver to H. at R. station, thirty bushels of Blue Mountain Improved Seneca Fall Wheat, which H. was to put out on shares, and to pay defendant

\$240 when delivered, and to equally divide the produce thereof with the holder of the order, after deducting said amount. On 23rd May defendant called, produced the order, and by false and fraudulent representations as to the quality of the wheat, and his having full control of it, its growth and yielding qualities, and that a note defendant requested him to sign was not negotiable, induced H. to sign the note. Evidence was received, under objection, of similar frauds on others, shewing that defendant was at the time engaged in practising a series of systematic frauds on the community. The defendant was found guilty, and convicted.

Held, on a case reserved, that the conviction should be affirmed on the second count, as the evidence shewed that the note was signed by H. not merely to secure the carrying out of the contract contained in the order, but on the faith of the representations made; and it was immaterial that a note was taken when the order called for cash; and, also, that the evidence objected to was properly receivable. *Regina v. Hope*, 463.

4. *Confession—Admission—Improper inducement—Evidence.*—Where it appeared that a police constable gave the usual caution to the prisoner, who was arrested on a charge of obstructing a railway train by placing blocks upon the line, but afterwards said to him: "The truth will go better than a lie; if anyone prompted you to it, you had better tell about it," whereupon the prisoner said that he did the act charged against him:

Held, that the admission was not receivable in evidence, and a conviction grounded thereon was improper

Regina v. Fennell, 7 Q. B. D. 147, followed. *Regina v. Romp*, 567.

5. *Larceny Act*, R. S. C. ch. 164, sec. 65—*Fraudulent conversion of negotiable securities by trustee—Letter shewing trust—Identity of instruments produced with those mentioned in letter—Conversion of proceeds of securities—Property, definition of—Sanction of Attorney-General—Proof of.*—The defendant was indicted and convicted under the *Larceny Act*, R. S. C. ch. 164, sec. 65, for that he, being a trustee of two negotiable securities for the payment of \$5,250 each, the property of the C. Bank, for the use and benefit of the C. bank, unlawfully and with intent to defraud, did convert and appropriate the two negotiable securities to the use and benefit of him, the defendant, &c.

At the trial the following letter, written and signed by the defendant, dated 6th November, 1885, was produced: "I have this day been entrusted by A. (the cashier of the C. bank) with two notes of \$5,250 each, for the specific purpose of paying two notes for \$5,000 that are due in Montreal on 8th November, 1885, and my failing this shall consider myself committing criminal offence and amenable to the criminal law."

The securities produced at the trial as those converted by the defendant were two drafts, not promissory notes, for \$5,250 each, dated 7th November, 1885; and two drafts for \$5,000 each were also produced answering the description of the notes for that amount mentioned in the letter, except that they were not actually notes, and were due at Toronto on the 9th November, instead of at Montreal on the 8th. It was shewn, however, that they were held by a person in Montreal.

It also appeared in evidence that the defendant procured one B. to discount the two drafts for \$5,250 each, B. retaining \$1,000 for an old debt, and paying part of the balance of the proceeds to the defendant in diamonds. The defendant did not take up the two \$5,000 drafts and retained the proceeds of the two new drafts.

The drafts were identified by witnesses as to dates, amounts, &c., and entries in the defendant's memorandum book, also produced, shewed the nature of the transactions with the cashier and B.

The trial Judge stated a case for the opinion of the Court.

Held, upon the evidence, that the drafts were the property of the bank and not of the cashier in his private capacity; and, upon the law and evidence, that the defendant was a trustee of the documents within the meaning of the statute; and that, notwithstanding the discrepancies as to the nature of the instruments, the due date, and place of payment, there was sufficient evidence to go to the jury of the identity of the drafts produced at the trial with the notes mentioned in the letter.

It was contended that the defendant should have been indicted for converting the proceeds of the securities, inasmuch as the securities were entrusted to the defendant for a purpose which rendered necessary the conversion of the securities themselves.

Held, that the nature of the transaction with B. shewed an appropriation by the defendant of the securities themselves to his own use; and

Per FALCONBRIDGE, J.—Even if it had been otherwise, the definition of property in sub-sec. (e.) of sec. 2 of R. S. C. ch. 164, shewed the sufficiency of the indictment.

It was objected that no proof was given at the trial that the sanction of the Attorney-General, required by R. S. C. ch. 164, sec. 65, sub-sec. 2, had been given.

Held, that this objection was not open to the Court upon a case reserved, not being a question that could properly arise at the trial.

Knowlden v. The Queen, 5 B. & S. 532, followed. *Regina v. Barnett*, 649.

See CONSTITUTIONAL LAW, 1.

COUNTY COURT.

See PROHIBITION, 1.

CROWN.

See CONSTITUTIONAL LAW, 2.

DAMAGES.

1. *Fire caused by defendant's negligence—Right to set off amount received from insurance company.*]

—In an action by plaintiff to recover damages for the destruction of his dwelling house and a quantity of chattel property, caused by sparks emitted from defendant's steam tug through defendant's negligence:

Held, that the defendant was not entitled to deduct from the amount of damages found to have been sustained by the plaintiff, an amount paid to the plaintiff by an insurance company under an insurance on the property. *Brown v. McRae*, 712.

See DOWER, 1.—MUNICIPAL CORPORATIONS, 6.—NEGLIGENCE.—PARTITION.—RAILWAYS AND RAILWAY COMPANIES, 6, 8.

DEED.

Description—Falsa demonstratio—Exception void for uncertainty—Operation of release—"Remise, release, and quit claim"—Operation of, as grant or bargain and sale—14 & 15 Vic. ch. 7, sec. 2—Possessory title.]

L. in conveying land to S. described it as being composed of the southerly half of lot 17 in the 4th concession of King, giving it the metes and bounds of the east half. The only part of lot 17 which L. had was that conveyed to him by B. as a part of lot 17, giving it the metes and bounds of the east half, the same as in the deed to S.; and the same quantity was conveyed in both deeds.

Held, that the metes and bounds given in the deed to S. correctly described the lands intended to be conveyed, and the words "southerly half" were controlled by them.

A sheriff's deed of lands sold at a tax sale described them as "forty-five acres of the south half of lot 17 in the 4th concession" of King; and the deed to S. before mentioned contained an exception, "save and excepting out of the same forty-five acres sold for taxes."

Held, that the exception was void for uncertainty; and a subsequent release of lands purchased at the tax sale by the sheriff's vendee to S. had sufficient to operate upon and was effectual as a release.

By indenture of bargain and sale made in 1856 between L. and K., L. in consideration of \$4,000 (the receipt whereof was thereby acknowledged), did remise, release, and quit claim unto K., his heirs and assigns, the south half, &c., to have and to hold, &c.

Held, that since 14 & 15 Vic. ch. 7, sec. 2, the words "remise, release, and quit claim," may operate as a

grant; and either before or since that enactment they would operate as a bargain and sale.

Acre v. Livingstone, 24 U. C. R. 282, not followed.

Held, also, upon the evidence, that the defendant had no such possession of the land in question as would extinguish the title of the true owner. *Pearson v. Mulholland et al.*, 502.

See TIMBER—TRUSTS AND TRUSTEES, 2.

DEFAMATION.

1. *Libel—Article in newspaper—Evidence of authorship—Refusal to answer as to authorship, claiming privilege against criminal proceedings—Effect of.*—Action of libel. The libel consisted of a letter published in a Boston, U. S., newspaper, claimed to have been written by defendant. The letter, which was signed by a person of the same name as the defendant, stated that it was written in answer to an anonymous letter, dated Sept. 15, published in the same newspaper, which the writer stated he had seen the manuscript of, and which was a clumsy attempt to make the writer believe was written further off than Ottawa, and had also seen the manuscript of a letter written by an Ottawa shoe dealer to a Boston firm, and that the hand-writing of both were the same. The anonymous letter referred to a trip made by defendant to New Brunswick, which was also referred to in the letter in question. The letter in question also spoke of the writer of the anonymous letter as a person who had come to Ottawa and opened a boot and shoe business, and stayed

at the same hotel as the writer of the letter in question. The letter also spoke of a certain machine called the Crescent Heel Plate Machine as *our* machine. The defendant at the trial refused to answer whether or not he was the writer of the letter in question, claiming privilege on the ground that it might criminate him, and the publishers, for the examination of whom a commission issued, refused to be examined for the like reason. The defendant in his examination stated that both he and the plaintiff were boot and shoe dealers in Ottawa; that he was a subscriber and correspondent to this paper; that he had been on a trip to New Brunswick, and on his return saw the anonymous letter of 15th September in this newspaper, as also the manuscript thereof, as well as the manuscript of a letter to a Boston firm, both apparently in the same handwriting. The plaintiff's counsel stated that in addition to the above he intended proving that when plaintiff came to Ottawa he stopped at the same hotel as defendant, and that defendant was the sole agent for the Crescent Heel Plate Machine.

Held, that this was sufficient evidence to go to the jury of defendant being the author of the letter in question.

Quere, whether the refusal to answer the direct question as to authorship, or the claim of privilege against criminal proceedings, afforded any evidence thereof, by way of admission or estoppel or otherwise. *Harkins v. Doney*, 22.

2. *Libel—Privilege—Excess of—Evidence of malice.*—The plaintiff had been treasurer of the township of O. from 1882 to 1886, when by reason of the auditors' report shewing that two sums of

\$1,400 and \$132.32 were not accounted for by him, he was dismissed. A commissioner was appointed by the Lieutenant-Governor, who examined into the matter, and in December made his report stating that the \$1,400 item was a mistake of the auditors, and that, except as to the \$132.32, all the township moneys were accounted for. The commissioner subsequently attended a meeting of the council, at which defendant, who was a councillor, was present, and after examining plaintiff on oath informed the council that he was satisfied with plaintiff's explanation as to \$125 of this sum, namely, being interest on his own moneys deposited with the township funds; and he made an addition to his report to that effect. In February following the plaintiff wrote to a newspaper that he was ready to pay the township any moneys either the council, auditors, or commissioner could shew he owed, whereupon the defendant wrote to the paper stating that the commissioner, apart from the mixing of moneys, had found plaintiff indebted in \$125, and also stating that plaintiff had made several thousand dollars out of the township, and could well afford to pay his shortage and still have some thousands to the good. In an action for libel,

Held, that the matter discussed in defendant's letter being one in which defendant was interested as a ratepayer and member of the council, there might be a qualified privilege, still it was for the jury to say whether under the circumstances the language employed was within the privilege, or was in excess of what the occasion justified: and if in excess, they could properly draw inference of malice.

The jury having found for plaintiff,

the Court refused to interfere. *Colvin v. McKay*, 212.

3. *Libel* — *Question for jury* — *New trial* — *Misdirection* — *Objection at trial* — *Pleading* — *Fair comment* — *Admissibility of evidence of truth of matters commented upon.* — In actions of libel new trials are not granted merely on the ground that the verdict is against evidence and the weight of evidence. It is for the jury to say whether alleged defamatory matter published is a libel or not, and the widest latitude is given to them in dealing with it.

When no objection is made at the trial to the Judge's charge, the ground of misdirection is untenable on a motion for a new trial.

In this action of libel the defendant did not plead justification, but he said in his defence that the alleged libel was a fair comment upon matters of public and general interest.

Held, that he was entitled under this defence to shew that the matters upon which he commented were true.

Lefroy v. Burnside, 4 L. R. (Ireland) 556; *Davis v. Shenstone*, 11 App. Cas. 187; and *Riordan v. Willox*, 4 Times L. R. 475, referred to. *Wills v. Carman*, 223.

DEPOSIT RECEIPTS.

See BANKS AND BANKING, 5.

DESCRIPTION.

See DEED.

DEVISE.

See WILL, 3.

DEVOLUTION OF ESTATES ACT.

See DOWER, 1.

DISCIPLINE.

See BARRISTER AND SOLICITOR.

DISCRETION.

See PUBLIC SCHOOLS, 2.

DISTRESS.

One demand of taxes sufficient for.]—See ASSESSMENT AND TAXES, 1.

See also LANDLORD AND TENANT, 2
—TAVERNS AND SHOPS.

DIVISION COURT.

See PROHIBITION, 2, 3, 4.

DOMINION PARLIAMENT.

See CONSTITUTIONAL LAW, 2.

DOWER.

1. Parties—Devolution of Estates Act, R. S. O. ch. 10E—Demand—Damages—Costs.]—M. M. made his will April 13th, 1888, devising his farm to his two sons, appointed the defendants his executors, and died May 21st, 1888. In an action of dower by the widow of M. M. against the executors, in which they set up that the sons were the tenants of

the freehold, and should be made parties, it was

Held, that since the Devolution of Estates Act, R. S. O. ch. 108, sec. 4, devisees are not necessary parties to an action for dower.

Held, also, that as no demand was made, although the plaintiff was entitled to judgment of *seisin*, it should be without costs; and as defendants were always ready and willing to assign the dower, plaintiff was not entitled to damages for detention. *Malone v. Malone et al.*, 101.

2. Partition—Decree for partition and sale—Vesting order—Married women not made parties—Inchoate rights of dower—R. S. O. ch. 44, sec. 53, sub-sec. 10—Conveyancing Act—Mortgage—Equitable dower—Bar-ring dower.]—On a vendor and purchaser application it appeared that in 1877 a decree was made for partition or sale of the lands in question, to which four married men were parties, whose wives, however, were not made parties, either originally or in the Master's office, and the lands were sold pursuant to the decree, and a vesting order granted to the purchaser, under whom the present vendor claimed title.

Held, that, notwithstanding the Conveyancing Act, R. S. O. 1887, ch. 44, sec. 53, sub-sec. 10, the inchoate right of dower of the wives was not affected by the proceedings.

Re Hall-Dare's Contract, 21 Ch. D. 41, considered.

In the case of two of the wives, their husbands had prior to the partition proceedings mortgaged the lands, the wives joining to bar their dower.

Held, that these two no longer had any right of dower.

Re Croskery, 16 O. R. 207, 209, referred to. *Re Hewish*, 454.

DRAINAGE.

See MUNICIPAL CORPORATIONS, 2.

EJECTMENT.

Action to recover land—Right to counter-claim without leave—Pleading—Joining in counter-claim other cause of action with claim for land—Right to—O. J. A., Rule 341.]—

To an action to recover possession of land it is a good cause of counter-claim that defendant was induced by his solicitor's fraud to make two promissory notes, which were then overdue, and in plaintiff's hands, who took them with knowledge of the fraud; and praying that plaintiff might be restrained from negotiating or parting with them, and that they should be delivered up to be cancelled; for the fact of the notes being overdue in plaintiff's hands had not the effect of destroying the right to have them delivered up.

Held, also, that to an action for the recovery of land the defendant can counter-claim without leave; but that he cannot in his counter-claim, without leave under Rule 341, join another cause of action with a claim for the recovery of land. *Pritchard v. Pritchard*, 50.

See EVIDENCE, 2—WILL, 5.

ELECTION.

See CONTRACT, 1.

ESTOPPEL.

See BANKS AND BANKING, 5—INSURANCE, 2, 3—MUNICIPAL CORPORATIONS, 8.

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EVIDENCE.

1. *Malicious prosecution—Rule 676—Leave granted to put in original information and judgment of acquittal.]—*In an action for false arrest and malicious prosecution arising out of a false information laid by defendant, a certified copy of the information having been put in and objected to at the trial, leave was given, under Rule 676, to put in the original afterwards, as also an exemplification of the judgment of acquittal, it appearing that the merits were not with the defendant. *Hamilton v. Broatch; Broderick v. Broatch*, 679.

2. *Admissibility—Communications by deceased person to solicitors—Privilege—Judgment for possession of land—Practice on entering—Order of trial Judge—Writ of possession—Rules 273, 274, 275, 341, 379, O. J. A.—R. S. O. 1877, ch. 51, sec. 34.]—*In an action by the devisee of R. to recover possession from the defendant of land conveyed by him to R., of which the defendant remained in possession, the defence was that the conveyance to R., though in form absolute, was intended to operate as a mortgage.

The evidence of E. and P., two solicitors, as to statements made to them by R. in his lifetime as to his intentions with regard to the land, was taken subject to objection.

The evidence of E. shewed that R.'s statement to him was made in E.'s office in the presence of P. and of another person who was a friend of R.'s, but not a professional man. E. thought R. made the statement as a preliminary to instructing him as to something that was to be done by him as a solicitor, but R. did not give any instructions, and there was

nothing to shew that he ever intended to do so, and no professional employment followed from the conversation. E. could not recollect whether he was asked for his advice or opinion at the time, but he made no charge for professional services.

P.'s evidence was, that he had spoken to R. about the affairs of F. as the solicitor and a friend of the F. family, and had advised R. to try to save the property in question for the F. family.

It also appeared that R. was an occasional client of E. and P., but that in the transactions in question he had employed other solicitors.

Held, that the communications to E. and P. were not made to them in their professional capacity, and were therefore not privileged, and were properly receivable in evidence; *FALCONBRIDGE, J.*, doubting as to the evidence of E.

The action was tried without a jury before the Consolidated Rules came into force, and the trial Judge ordered that the judgment should be entered for the plaintiff for possession of the land, and judgment was at once entered accordingly, and the plaintiff put in possession by the sheriff under a writ of possession.

Held, that under the practice, and having regard to Rules 273, 274, 275, 341, and 379, of the Ontario Judicature Act, 1881, there was nothing to remove actions for the recovery of land out of the general rule, and the entry of judgment and subsequent proceedings were regular.

Section 34 of R. S. O., 1877, ch. 51, was repealed by Rule 273 of the Ontario Judicature Act, 1881. *Rudd v. Frank*, 758.

Admissibility of—Libel—Truth of matters commented on.—See DEFAMATION, 3.

Whether rape accomplished through fear or solicitation.—See CRIMINAL LAW, 1.

As to whom credit given under a contract.—See CONTRACT, 1.

Of authorship of libellous letter.—See DEFAMATION, 1.

Taken under sec. 36, R. S. O. ch. 145, should be under oath.—See BARRISTER AND SOLICITOR.

See also CANADA TEMPERANCE ACT, 1, 3—CRIMINAL LAW, 3, 4.—DEFAMATION, 3.—HUSBAND AND WIFE, 2.—JURY, 2.—MEDICAL PRACTITIONER—PROHIBITION, 4—RAILWAYS AND RAILWAY COMPANIES, 8—WILL, 2, 5, 8.

EXCEPTION.

See DEED.

EXECUTION.

Assignment for creditors—Priority—“Completely executed by payment”
—*Constitutional law—Bankruptcy—Creditors Relief Act—R. S. O. 1887 ch. 124, secs. 4, 9,—43 Vic. ch. 10 (O).*—A writ of *fi. fa.* against the lands of one H. had been in the sheriff's hands since 1880. In 1887 the sheriff sold under it and received the purchase money. Afterwards and before payment over by the sheriff to the execution creditors, H. assigned for the benefit of his creditors under R. S. O. 1887 ch. 124. The assignee then claimed the money in the sheriff's hands.

Held, affirming the decision of ROBERTSON, J., that the assignee was not entitled to the money.

Per BOYD, C.—R. S. O. 1887 ch. 124, sec. 9, applies to executions to which the Creditors Relief Act applies, and where distribution has to be made under that Act, and did not apply to the writ in this case; and the writ in this case was executed by the sale of the lands and receipt of the money, which then became the property of the execution creditors.

Semble, that if R. S. O., 1887, ch. 124, sec. 9, is to receive such a construction as would pass the money in a case such as this to the assignee, thus giving him a higher right than the execution debtor had, then the enactment is *ultra vires* as a bankruptcy provision.

Per FERGUSON, J.—The authorities clearly shew that after receipt of the money by the sheriff, the writ was executed; and *semble*, that “completely executed by payment” in R. S. O. 1887 ch. 104, sec. 9, means voluntary or involuntary payment to the sheriff.

Sinclair v. McDougall, 29 U. C. R. 388, specially referred to. *Clarkson v. Severs*, 592.

EXECUTORS AND ADMINISTRATORS.

See NEGLIGENCE — TRUSTS AND TRUSTEES, 4.

EXEMPTION.

See ASSESSMENT AND TAXES, 4.—
CONSTITUTIONAL LAW, 2.

EXONERATUR.

See BAIL.

EXPROPRIATION OF LAND.

See MUNICIPAL CORPORATIONS, 3.

FALSE ARREST.

See EVIDENCE, 1.

FALSE PRETENCES.

See CRIMINAL LAW, 2, 3.

FINES.

See CANADA TEMPERANCE ACT, 4
—JUSTICE OF THE PEACE, 4.

FOREIGN JUDGMENT.

Action for penalty—Effect of, in suing in this Province.—The defendant was a shareholder and director in a joint stock company, incorporated under the laws of the State of New York, having its head office in that State. The plaintiff, a creditor of the company for money loaned to the company, sued and recovered judgment against defendant for an alleged false certificate given by defendant while such director as to the amount of paid up stock in the company, whereby, under certain statutes of the said State, defendant became liable byway of penalty to all the debts of the company. In an action in this Province on the judgment,

Held, that, as the only cause of action which the plaintiff alleged was based on an offence committed against the laws of the State of New York, and the only sum he sought to recover was the penalty imposed by statute of the said State as the punishment for the offence, the

judgment could not be recognized as creating a debt enforceable in this Province. *Huntingdon v. Attrill*, 245.

FRANCHISE.

See CANADA TEMPERANCE ACT, 5.

FRAUD.

See ASSESSMENT AND TAXES, 3.—COMPANY, 1.—CRIMINAL LAW, 3, 5.—WILL, 3.

FRAUDULENT PREFERENCE.

Present actual bonâ fide advance of money—Chattel mortgage—Assignment for creditors—R. S. O. ch. 124, sec. 3—Principal and agent.—An insolvent debtor was taken by one of his creditors to the latter's solicitor, and then it was arranged that the solicitor should procure some one to lend the insolvent \$600 on his stock in trade, the solicitor at the same time taking from the insolvent a written authority to pay the claim of the said creditor out of the moneys advanced. The solicitor accordingly got defendant to lend the money on a chattel mortgage of the stock in trade, without, however, letting him know anything about the insolvent's circumstances, or why the money was wanted, or how it was to be applied. Out of the money the solicitor paid off the creditor in full. The insolvent afterwards made an assignment for the benefit of his creditors to plaintiff, who brought this action to set aside the chattel mortgage.

Held, that the action must be dismissed, for the mortgage in question was made in consideration of a

present *bonâ fide* advance of money within the meaning of R. S. O. ch. 124, sec. 3, nor (*per* FERGUSON, J.) could it be said that the 'effect of the mortgage' was to prefer the creditor, for this was the effect solely of the act of the solicitor, acting apparently altogether for another principal.

The rule is, that the fraudulent act of an agent does not bind the principal unless it is done for the benefit of the principal, or unless the principal knows of or assents to it, or takes an advantage by reason of it. *Gibbons v. Wilson*, 290.

See BANKS AND BANKING, 3.

GAMING.

Stock gambling—Summary conviction—51 Vic. ch. 42, (D.)—R. S. C. ch. 158.—The Act 51 Vic. ch. 42, sec. 1, (D.) makes it an indictable offence to make or authorize contracts by way of gaming or wagering on the rise or fall of stocks and merchandize, and to habitually frequent any office or place where such contracts are made. By sec. 3: The keepers of such places are to be held keepers of common gaming houses; the place of business to be a common gaming house; and the instruments used instruments of gaming, "the whole within the meaning of R. S. C. ch. 158, the Act respecting Gaming Houses, and shall be subject to all the provisions of the said Act." Sec. 6 of the R. S. O. ch. 158 enacts that persons playing are looking on while others are playing are guilty of an offence under the Act; and by sec. 9 authority is given to the police magistrate to try offences under the Act summarily. An information under R. S. C. ch. 158 charging

the defendant and others with unlawfully playing in a common gaming house, was heard before the police magistrate summarily, and the defendant convicted. The evidence shewed that the defendant was merely in a place where it was alleged that contracts in violation of the 51 Vic. ch. 42 were made.

Held, that sec. 3 of 51 Vic. ch. 42, (D.) was not incorporated into secs. 4 and 6 of R. S. O. ch. 158 so as to cause the fact of a person being in an office or place of business where such prohibited contracts were made to be equivalent to playing, or looking on while others were playing, in a common gaming house, and so punishable by summary conviction. *Regina v. Murphy*, 201.

GENERAL SESSIONS.

See JUSTICE OF THE PEACE, 1.

HARBOUR WORKS.

See MUNICIPAL CORPORATIONS, 8.

HEIRS-AT-LAW.

See WILL, 3.

HIGHWAY.

See MUNICIPAL CORPORATIONS, 6.

HUSBAND AND WIFE.

1. *Conveyance of real estate by married woman—Necessity for joining husband—Tenancy by the curtesy initiate—R. S. O. ch. 132, sec. 4, sub-secs. 2, 3—Order under 51 Vic. ch. 21,*

(O.)—In an action for specific performance by a married woman, the question was whether the husband of the plaintiff was entitled to a tenancy by the curtesy initiate in certain land of the plaintiff which she agreed to sell to the defendant, so as to require the joining of the husband in the conveyance.

The marriage took place in 1867, and issue had been born alive. The land was acquired by the plaintiff, one portion in 1879, and the remainder in 1882.

Held, that the case was governed by R. S. O. 1877, ch. 125, secs. 3 and 4, similar to sub-secs. 2 and 3 of sec. 4 of R. S. O. 1887, ch. 132, and the land could not be conveyed by the plaintiff alone, unless by virtue of an order under 51 Vic. ch. 21 (O.), so as to give the purchaser a title free from the husband's claim; and under the circumstances of this case such an order was made.

Semble, the wife alone could convey her own estate in the land.

Re Konkle, 14 O. R. 183, and *Adams v. Loomis*, 24 Gr. 242, considered. *Wylie v. Frampton*, 515.

2. *Breach of promise of marriage—Infancy of defendant—Ratification at majority—R. S. O. ch. 123, sec. 6—Evidence—Corroboration—R. S. O. ch. 61, sec. 6—Contract not to be performed within a year—Statute of Frauds.*—In an action for breach of promise of marriage the defendant admitted a promise but said that he was an infant when he made it, and there was no ratification in writing after majority, as required by R. S. O. ch. 123, sec. 6. The plaintiff insisted that there was no engagement between her and the defendant until he became of age on the 20th of August, 1887. The jury found that the promise to marry was first made

on that day. There being evidence to sustain that finding, and also evidence upon which the jury might have found a previous promise, the Court refused to interfere with the finding.

There was evidence to corroborate the statement of the plaintiff that an engagement to marry existed, such evidence being not inconsistent with the precise engagement sworn to by the plaintiff as having been entered into on the 20th August, 1887.

Held, that this evidence satisfied the requirements of R. S. O. ch. 61, sec. 6, and it was not necessary that it should go so far as to negative the promise which the defendant admitted he made before majority.

The plaintiff swore that "it was to be a year's engagement, and we were to be married in the following August."

Held, that this was not an agreement not to be performed within a year, and was therefore not void under the Statute of Frauds, although not in writing. *Smith v. Jamieson*, 626.

See INSURANCE, 4.

IMPRISONMENT.

See JUSTICE OF THE PEACE, 4.

INDIANS.

See CANADA TEMPERANCE ACT, 5.

INDIAN LANDS.

Removing hay from—What constitutes "hay"—Right to include costs of commitment and conveying

to gaol in conviction—Indian Act, R. S. C. ch. 43, sec. 26.]—The defendant was convicted for removing hay from Indian lands contrary to sec. 26 of the Indian Act, R. S. C. ch. 43.

Held, that the word "hay," used in the statute, does not necessarily mean hay from natural grass only, but what is commonly known as hay, namely, either from natural grass or grass sown and cultivated.

Held, also, that under this Act and the legislation incorporated therewith, there is no power to include in the conviction the costs of commitment and conveying to gaol. *Regina v. Good*, 725.

See CANADA TEMPERANCE ACT, 5.

INDORSEMENT.

Order of adjournment on conviction.]—*See* JUSTICE OF THE PEACE, 1.

Of warrant of commitment into another county.]—*See* JUSTICE OF THE PEACE, 2.

On life insurance policy in favour of wife, where policy effected before marriage.]—*See* INSURANCE, 4.

INFANT.

See HUSBAND AND WIFE, 2—WILL, 3.

INQUEST.

See CORONER.

INSURANCE.

1. *Fire—Policy effected before R. S. O. 1887—Appraisement—Arbitration—Costs—R. S. O. 1877 ch.*

162; *R. S. O. ch. 167, sec. 114.*]—A church was insured under a three years' policy on November 14th, 1885, and was destroyed by fire May 31st, 1888. The insurance company admitted the loss, but required the damages to be proved, and a submission to appraisers was entered into by the parties, in which it was provided that "the award made by them [the appraisers] or any two of them, shall be binding upon both of said parties as the amount of such damage to said insured property, but shall not determine any question touching the legal liability of said company," &c. Two of the appraisers joined in an award giving the insured the full amount claimed, and ordered the company to pay the costs of the reference and award. The company refused to pay any costs over and above half the arbitrators' fees.

Held, (affirming the Master in Chambers), that *R. S. O. 1887 ch. 167, sec. 114*, was applicable to the policy in question, and that the Legislature intended by the use of the words, "or otherwise in force in Ontario, with respect to any property therein," that section to be applicable to all policies existing at the time the Act came into force, and that costs were properly awarded under sub-sec. 16 of that section. *Re St. Philip's Church, Weston, and The Glasgow and London Insurance Co.*, 95.

2. *Life—Benevolent society—Standing of deceased member—Reinstatement—Estoppel—Waiver—Costs.*]—W., who was a member of a subordinate court of the defendant society, died on the 6th May, 1884. His administratrix claimed in this action the amount of an endowment certificate upon his life, which was subject to a condition that the assured should

at the time of his death be a member of the society in good standing. W. had not paid his monthly assessment due 1st March, 1884, and by his failure to pay had become at once suspended by virtue of one of the by-laws of the society, and his name appeared upon the list of suspended members in the minutes of a meeting held that month. He had taken cold at Christmas, 1883, and by the end of February, 1884, it was apparent that he could not recover, and he never rallied up to the time of his death. Shortly before the 25th April, 1884, a sum sufficient to pay his assessments due 1st March, 1st April, and 1st May was paid on his behalf to the financial secretary of the subordinate court. The conditions to be performed by a suspended member desirous of being reinstated after a suspension had been in force for thirty days were, according to the by-laws, payment of arrears, passing medical examination, and being approved of by two-thirds vote of the subordinate court. It was not possible for W. to have complied with the second condition, and he did not attempt to do so.

Held, that the by-laws were binding upon W. and the plaintiff, and that he, not having been reinstated in accordance therewith, was not a member in good standing at the time of his death.

It was contended, however, that the fact of the receipt of the arrears by the financial secretary, and certain other circumstances, shewed a waiver or created an estoppel on the part of the defendants.

It appeared that the financial secretary was not familiar with the by-laws, and thought and informed W. that he was restored to good standing by the payment of arrears; that he transmitted the assessments paid

to the supreme secretary of the society, who received and retained them, but carried them to the credit of the subordinate court, instead of to the credit of W., because in his view the reinstatement was not completed; and that W. was reported reinstated by the subordinate court on 25th April, 1884. The financial secretary had the right, under the by-laws, to receive the arrears, but only as a first step towards reinstatement.

Held, that in view of the fact that W. was hopelessly ill when the supreme secretary acknowledged the receipt of the assessments, there was no ground for the contention that the defendants were estopped from denying that they accepted the money with the intention of keeping the policy alive and of waiving the medical examination; and that, under all the circumstances, there was neither the intention nor the authority on the part of the supreme secretary to waive the examination.

As the plaintiff had been led by the action of the supreme secretary and the officers of the court below to believe that W. had been reinstated, no costs were given against her. *Wells v. Supreme Court of the Independent Order of Foresters*, 317.

3. *Life—Provident institutions—Default in payment of dues—Forfeiture clauses in life insurance policies—Waiver—Estoppel.*]—The plaintiff's husband was the holder of two certificates of the defendants, a provident institution, whereby, on his paying \$1.50 and \$2.50 respectively semi-annually on May 15th and November 15th, together with assessments, and conforming to the conditions thereof, the defendants promised to pay the plaintiff a certain amount on his death. Among the conditions were, that

thirty days' default in payment would suspend him from membership and void the certificates, and that he should then be re-instated on furnishing satisfactory proof of good health within ninety days from such suspension, and paying arrears, and in the meanwhile the certificates should be void, and of no effect.

Plaintiff's husband was in his ordinary good health on August 27th, 1886, but died on September 2nd, 1886, having paid all dues and assessments regularly up to May 15th, 1886. It appeared that on August 14th the plaintiff's husband received a letter from the defendants' secretary requesting payment of the dues due on May 15th, 1886, and of a certain assessment, and the same day remitted the money, and on August 21st, 1886, the defendants sent written receipts therefor, marked across their faces: "Conditional that you are in good health;" and also wrote demanding payment of a certain other assessment as due from the plaintiff's husband as a member, which communication, however, never reached him. On August 23rd, 1886, the plaintiff wrote to the defendants offering to pay the assessment, and on the same day the defendants replied that they had received the money, and forwarded the receipts to the plaintiff's husband, and added that they trusted that this would be satisfactory. The plaintiff's husband was retained on the defendants' books as a member all the while, and the certificates were never cancelled. It also appeared that it had not been the general practice of the defendants to hold members to the strict terms of the payments. The plaintiff now brought this action against the defendants to recover upon the certificates.

Held, affirming the decision of ROBERTSON, J., that the plaintiff was entitled to judgment, for the evidence shewed that there was no intention up to her husband's death, and for some time thereafter, to take advantage of his default in payment, and the receipt of the money in August by the defendants, and their crediting him on the books therewith, clearly revived the certificate, and the defendants could not be allowed to fall back on the default in order to destroy the plaintiff's right.

Per BOYD, C.—Upon the record supplied by the books and practice of the corporation, the deceased never ceased to be a member. *Horton v. The Provincial Provident Institution*, 361.

4. *Life—Policy effected before marriage—Indorsement in Ontario in favour of wife after marriage—Policy issued out of this Province—Law governing indorsement—Creditors—Administrator—R. S. O. ch. 136.*—The husband of the defendant, while a bachelor domiciled in this Province, had in the years 1871 and 1876 effected three policies of insurance on his life with companies whose head offices in Canada were at M., in the Province of Quebec, where the insurance moneys were payable. After his marriage, while still domiciled in this Province, he indorsed declarations on the policies in favour of defendant, and handed them to her. After his death the insurance moneys were claimed by the defendant and by the plaintiffs as administrators of his estate, against which there were creditors.

Held, that the indorsements on the policies were governed by the law of this Province.

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Lee v. Abdy, 17 Q. B. D. 309, followed.

Held, however, that as defendant's husband was not a "married man" at the time he effected the policies, he could not (not being within the exception provided in 47 Vic. ch. 20, sec. 2) withdraw from the claims of his creditors the benefit of the policies effected before marriage, by indorsements or declarations after marriage for the benefit of his wife, and the plaintiffs were entitled to the insurance moneys. *The Toronto General Trusts Company v. Sewell*, 442.

See DAMAGES—MORTGAGE, 3.

INTEREST IN LAND.

See TIMBER.

INTOXICATING LIQUORS.

1. *Liquor License Act, R. S. O. ch. 194, sec. 11, sub-secs. (8), (14)—Petition against issue of license in polling sub-division—Form of petition—Particularity.*—The Liquor License Act, R.S.O. ch. 194, sec. 11, sub-sec. (14), provides that "No license shall be granted to any applicant for premises not then under license or shall be transferred to such premises if a majority of the persons duly qualified to vote as electors in the sub-division at an election for a member of the Legislative Assembly, petition against it, on the grounds hereinbefore set forth, or any of such grounds."

More than one-half of the electors in a certain polling sub-division petitioned the license commissioners of the district "against the issue of any license within the bounds of said

polling sub-division * * for reasons specified in sec. 11, sub-sec. (8), of the Liquor License Act, R. S. O., or for one or more of such reasons"—not otherwise specifying any grounds or referring to any applicant or premises.

The plaintiff was an applicant for a license for premises not under license situate in the sub-division, and the question stated for the opinion of the Court was whether under sec. 11, sub-sec. (14), the presentation of the petition precluded the defendants, the license commissioners, from certifying for a license to the plaintiff.

Held, that the petition did not conform to the statute, which requires that the objection shall be to the granting of a particular license, and also that some one or more of the reasons given in sub-sec. (8) shall be set forth, or all of them specifically alleged; and, therefore, the defendants were not precluded from certifying for a license. *Pizer v. Fraser et al.*, 635.

2. *Liquor License Act—Club incorporated under Benevolent Societies Act—Sale of liquor by.*—*Held*, that the meaning of section 53, sub-sec. 3, of the Liquor License Act is that where in a club or society incorporated under the Benevolent Societies Act, liquor is sold or supplied to members, but such sale or supplying is not the special or main object of the club, &c., but is merely an incident resulting from its principal object, there is no violation of the License Act, but it is otherwise if the sale or supplying the liquor is the main object of the incorporation.

The question, however, is for the decision of the magistrate on the evidence, and there being evidence

in this case, which was that of a club purporting to be a gun club, to support the finding of the magistrate that the sale of liquor was the special or main object of the club with the intent to evade the Liquor License Act, the Court refused to interfere with the finding, and dismissed a motion to quash a conviction made by him against defendant. *Regina v. Austin*, 743.

See CANADA TEMPERANCE ACT.

INTRA VIRES.

See CONSTITUTIONAL LAW, 2

JOINT TENANTS.

See TRUSTS AND TRUSTEES, 2.

JUDGMENT.

See FOREIGN JUDGMENT—PROHIBITION, 3.

JURY.

1. *Challenge — Bias of jury—Change of venue.*—At the trial of an action the defendant's counsel challenged a jurymen for cause. On the trial Judge stating that he did not think any cause was shewn, and that the counsel had better challenge peremptorily, the counsel did not claim the right to try the sufficiency of any cause against the impartiality of the jurymen, but accepted the opinion of the Judge, and the jurymen remained on the jury.

Held, that on a motion for a new trial an objection to the jurymen could not be entertained.

The action was tried at Brantford, and a new trial was moved for at a place other than Brantford, because the jury there were biassed against defendant.

Held, that this formed no ground for a new trial. *Wood v. McPherson*, 163.

2. *Dispensing with jury after evidence taken.*—The Judge at the trial of an action has the power to dispense with the jury after all the evidence has been taken, but the power should be sparingly exercised. *Marks v. The Corporation of the Town of Windsor*, 719.

3. *New trial—Omission to swear juror.*—The Court will not grant a new trial because one of the jurors has not been sworn, where no injustice is done thereby. *Goose v. The Grand Trunk R. W. Co.*, 721.

See CORONER — RAILWAYS AND RAILWAY COMPANIES, 1, 2—CRIMINAL LAW, 1—DEFAMATION, 2, 3—PROHIBITION, 4.

JUSTICE OF THE PEACE.

1. *General Sessions — Appeal to against conviction—Adjournment to following sessions—Indorsement on conviction—Necessity for.*—An appeal from a conviction for malicious injury to property came on for hearing at the General Sessions. No order of adjournment was indorsed on the conviction, the clerk merely entering a minute of the order in his book. At the following sessions the appeal was heard and the conviction quashed.

Held, that the provision in sec. 77 of R. S. C. ch. 178, as to indorsing the order of adjournment on the

conviction was not imperative, but directory merely, and therefore the omission to make the indorsement did not affect the validity of the order to quash. *Regina v. Read*, 185.

2. *Backing warrant of commitment—Adjoining county—Illegality—Joint trespass—Damages—Constable executing, liability of*—24 Geo. II. ch. 24—*Notice of action—Interpretation Act.*—The plaintiff, who resided in the county of H., was convicted before defendant G., a police magistrate for the county of B., for giving intoxicating liquor to an Indian, and fined with committal to the county gaol of B. on non-payment of the fine. The fine not having been paid, G. issued a warrant of commitment directed to all the peace officers of B. to arrest plaintiff, and prepared a form of indorsement to be signed by a justice of the peace of H., authorizing the defendant N., a constable, to arrest plaintiff in H. G. handed the warrant to N., telling him plaintiff lived in H. and he would have to get the warrant indorsed. N. took it to R., a justice of the peace for H., who signed the indorsement, and plaintiff was arrested by N. and taken first before G. in B. to see if he would accept a note in payment, and then to the county gaol of B. The plaintiff was afterwards discharged on *habeas corpus*, but the conviction was not quashed.

Held, [GALT, C. J., dissenting] that the action was maintainable against the defendants G. and R.; that there was no power enabling R. to indorse the warrant, and that he was guilty of trespass in so doing; and that G. was liable as a joint trespasser, for by his interference he was responsible, not only for the arrest, but for the subsequent deten-

tion in the gaol of B. ; and that it was not necessary to quash the conviction before action brought, as the arrest in the county of H. was not anything done under a conviction or order within sec. 4 of R. S. O. ch. 73.

At the trial the jury found that plaintiff had sustained no damage as against R., and they assessed the damages solely against G. Judgment was thereupon entered as against G., and the action dismissed as to R.

Held, that the finding of the jury as to the damages was in law permissible; but had R. been held liable, as plaintiff at most could only have had a new trial, or elect to retain his judgment as against G. alone, the Court would not interfere with the finding.

Quære, whether the constable N. was protected under 24 Geo. II. ch. 24.

The indorsement on the notice of action was that it was "given by V. M. of Queen street, in the city of Brantford, in the county of Brant, solicitor for the within named James Jones." Within was the notice, namely, "I do hereby as solicitor for and on behalf of James Jones, of the village of Jarvis, in the county of Haldimand, farmer," etc.

Held, that the notice taken in connection with the Interpretation Act, 31 Vic. ch. 1, sec. 29, (O.) was sufficient. *Moran v. Palmer*, 13 C. P. 538, not followed as decided prior to said Act; but *Quære* whether any notice of action was necessary.

Form of order as to costs of N. given. *Jones v. Grace*, 681.

3. *Fraud on cheese factory*—51 Vic. ch. 32, (O.)—*Offence outside of county*—*Jurisdiction of police magistrate*—*Certiorari*—*Ultra vires*.]—The defendant was tried

at Belleville before the police magistrate of the county of Hastings and convicted for, amongst other things, supplying milk from which the cream or strippings had been taken or kept back. The factory was in Hastings, but the defendant resided and the milk was supplied in the county of Lennox and Addington.

Held, that the police magistrate of Hastings had no jurisdiction to try the offence, and the conviction must be quashed.

Held, also, that *certiorari* has not been taken away in such cases; but, even if it had, the Court would not be justified in refusing to examine the evidence to see if the magistrate had jurisdiction. *Regina v. Dowling*, 698.

4. *Action against—Summary Convictions Act—Imprisonment for non-payment of fine after payment of costs.*]

—A conviction under the Summary Convictions Act required the defendant to pay a fine and costs; in default of payment distress, and in default of sufficient distress imprisonment. The plaintiff paid the costs, and was arrested and imprisoned for non-payment of the fine. The conviction and commitment remained in force unquashed. In an action of trespass for false imprisonment,

Held, that the conviction could be enforced by imprisonment for non-payment of the fine, notwithstanding the payment of the costs, and therefore, with the conviction remaining in force, the action was not maintainable.

The law laid down in *Trigerson v. Board of Police of Cobourg*, 6 O. S. 405, not followed in this respect. *Sinden v. Brown*, 706.

5. *Malicious Injuries to Property Act*—R. S. C. ch. 163—*Warrant of*

commitment—Omission of “unlawfully”—Effect of—Omission of amount of damage.—Under sec. 58 of the Malicious Injuries to Property Act, R. S. C. ch. 168, the offence must be “unlawfully and maliciously” committed, and the damage must exceed twenty dollars.

In this case the warrant of commitment charged the offence as having been wilfully and maliciously committed, omitting the word “unlawfully.”

Held, that this was fatal to the commitment, and it was directed to be quashed.

Held, also, that the commitment should have alleged that the damages exceeded twenty dollars. *Regina v. Fife*, 710.

See CANADA TEMPERANCE ACT, 1,
2—INDIAN LANDS.

LANDLORD AND TENANT.

1. *Agreement for a lease—Possession—Tenancy at will.*—The defendant entered into negotiations with a loan company, who were the owners of a farm, for a lease thereof to him. The terms were discussed, and pending a lease to be prepared by the company's solicitors and executed by defendant he was allowed to enter into possession. The defendant admitted that until he executed the lease there was no completed agreement. A lease was accordingly prepared, containing what the company understood were the terms, which defendant refused to execute. The company thereupon sold the land to plaintiff, and gave defendant notice to quit. In an action by plaintiff to recover possession,

Held, that the plaintiff was entitled to recover; that as the defen-

dant was not in possession under any concluded agreement regarding the lease, he was merely in as tenant at will to the loan company, which tenancy was determined by the notice to quit. *Lennox v. Westney*, 472.

2. *Verbal lease of land—Expiry of term upon day certain—Notice to quit—Sub-lease—Overholding tenants—Warrant of distress—Creation of new tenancy—Payment of rent.*—Since the Judicature Act the result of a verbal lease of real property for more than three years, to continue until and expire upon a day certain, where the tenant has taken possession, is that he is bound to give up possession at the end of the stipulated period without any notice to quit.

And where McC., the tenant for such a term, sub-let to the defendants, but not for any definite period;

Held, that their term also expired upon the day the original tenancy expired, and when they continued in possession thereafter they were overholding tenants.

The plaintiff, the landlord, issued a distress warrant for rent of the premises in question after the expiry of the term, and the defendants, without the concurrence of McC., who had tried to dislodge them, and refused to receive rent from them after the expiry of the term, paid the rent demanded to the plaintiff's bailiff, not as being due by themselves, but as being due by McC., to the plaintiff. The warrant recognized McC. as being tenant on the day of its date, some months after the expiry of the term, but did not recognize the defendants' rights in any way. In an action of ejectment the defendants disclaimed being tenants under the plaintiff and insisted that they were still in under McC.

Held, that the payment of the rent did not, under the circumstances, establish a new tenancy between McC. and the defendants, even if McC. ever became the tenant of the plaintiff after the expiry of his original term, which was not shewn.

The plaintiff after the expiry of the term served on the defendants a written notice to quit, in which they were recognized as his tenants.

Held, that, having disclaimed being tenants to the plaintiff, the defendants were not entitled to notice to quit, and if they were, the one they received was sufficient. *Magee v. Gilmour et al.*, 620.

See CANADA TEMPERANCE ACT, 6.

LARCENY.

See CRIMINAL LAW, 5.

LAW SOCIETY.

"Retired judge" — *Ex officio bencher*—*R. S. O. 1877 ch. 138, sec. 4.*—A Judge of one of the Superior Courts of this Province, who resigns his office without superannuation, under *R. S. C. ch. 138, sec. 14*, and who resumes the practice of the law, is a "retired Judge" within the meaning of *R. S. O. 1877 ch. 138, sec. 4*, and as such is an *ex officio* Bencher of the Law Society of Upper Canada. *Macdonnell v. Blake et al.*, 104.

See BARRISTER AND SOLICITOR.

LEASE.

See CANADA TEMPERANCE ACT, 6
—*LANDLORD AND TENANT, 1, 2.*

LEGACY.

See WILL, 1, 2.

LIBEL.

See DEFAMATION.

LICENSE.

See INTOXICATING LIQUORS, 1.

LIEN.

Mechanics' lien — *Material men* — *Extent of lien* — *Cross-claim by owner against contractor* — *Set-off* — *Payment* — *Registered claim of lien, requirements of* — *R. S. O. ch. 126, secs. 9, 10, 16, and schedule* — *Affidavit* — *Commissioner.* — The last of the materials in respect of which the plaintiffs, as sub-contractors, claimed a lien under the Mechanics' Lien Act upon the estate of the landowner, were delivered on the 16th September, 1887, and the claim of lien was not registered nor was notice in writing given until the 11th October, 1887, and this action to enforce the lien was not brought till 29th October, 1887.

Held, that under secs. 9 and 10 of *R. S. O. ch. 126*, the lien claimed did not attach so as to make the owner liable to a greater sum than the sum payable by the owner to the contractor.

Goddard v. Coulson, 10 A. R. 1, followed.

The owner had an old account against the contractor for bread supplied, which account, with interest, he charged against the sum due to the contractor under the contract.

Held, upon the evidence, that the account and interest should be treated, not as a matter of set-off, but as a payment of so much of the contract price.

Sec. 16 of R. S. O. ch. 126 requires that the claim of lien shall state the time or period within which the materials were furnished. The claim registered in this case did not state the year, but only the months and days of the months. It stated, however, that the materials were furnished on or before the 17th September, 1887; and in this and all respects it followed Form 1 in the schedule to the Act; and sub-sec. 2 of sec. 16 provides that the claim may be in one of the forms given in the schedule to the Act.

Held, that the statement that the materials were furnished on or before a named day was a sufficient statement of the time or period within which they were furnished, according to the true intent and meaning of sec. 16.

Roberts v. McDonald, 15 O. R. 80, overruled.

The question of the authority of schedules to Acts of Parliament discussed.

The land upon which the lien was claimed was in the county of Wellington, but the affidavit of the plaintiffs verifying the claim of lien registered was made in the county of Bruce, and before a commissioner for taking affidavits in that county.

Held, that the affidavit satisfied sec. 16, sub-sec. 2, of the Act. *Truax et al. v. Dixon et al.*, 366.

See MORTGAGE, 1.

LIQUIDATORS.

See BANKS AND BANKING, 2—COMPANY, 3.

LIQUOR LICENSE ACT.

See INTOXICATING LIQUORS, 1, 2—MUNICIPAL CORPORATIONS, 4.

LOCAL MASTER.

See PARTITION.

MALICE.

See DEFAMATION.

MALICIOUS PROSECUTION.

See EVIDENCE, 1.

MANDAMUS.

See PUBLIC SCHOOLS, 2.

MARRIED WOMAN.

See DOWER, 2—HUSBAND AND WIFE, 1.

MASTER AND SERVANT.

Responsibility of master for act of servant—Joint wrongdoers.—Under a hire receipt of an organ sold by defendant R. to plaintiff's son, and signed by the latter, the defendant R. was authorized on default of payment to resume possession of the organ, and he and his agent were given full right and liberty to enter any house or premises where the organ might be, with authority to remove the same, without resorting to any legal process. Default having been made in payment of certain instalments due under the hire receipt, defen-

dant R. sent his bookkeeper, the other defendant, and two assistants, with instructions to get the organ. The bookkeeper, taking the hire receipt as his authority, went to plaintiff's house, where the organ was, opened the house door and entered the hall, but on his attempting to open the door of the room in which the organ was, the plaintiff's wife (the plaintiff and the son being absent), resisted his entrance, when a scuffle ensued, and the plaintiff's wife was injured.

Held, that R. was responsible for the acts of his servant, the bookkeeper, for they were done by him in the discharge of what he believed to be his duty, and were within the general scope of his authority.

Held, also, that the judgment against both R. and the bookkeeper was maintainable, for it was recovered against them as joint wrongdoers. *Murphy v. Corporation of Ottawa*, 13 O.R. 334, distinguished. *Ferguson v. Roblin et al.*, 167.

MECHANICS' LIEN.

See LIEN.

MEDICAL PRACTITIONER.

Practising medicine — Evidence of—Costs.—The defendant attended a couple of sick persons, for which he received payment, but he neither prescribed nor administered any medicine nor gave any advice, his treatment consisting of merely sitting still and fixing his eyes on the patient.

Held, that this was not a practising of medicine, contrary to the provisions of R.S.O. ch. 148, sec. 45, and a conviction therefor was con-

sequently quashed, and with costs against the private prosecutor, as it appeared that he had a pecuniary interest in the conviction.

Regina v. Hall, 8 O.R. 407, distinguished. *Regina v. Stewart*, 4.

MERGER.

See MORTGAGE, 2.

MESNE PROFITS.

See TRUSTS AND TRUSTEES, 2.

MISDIRECTION.

See DEFAMATION, 3.

MISREPRESENTATION.

See COMPANY, 1.

MORTGAGE.

1. *Sale by mortgagor subject to mortgage—Further mortgage by purchaser—Lien of mortgagor on land for amount of mortgage.*—The defendant mortgaged certain lands to the plaintiffs, covenanting to pay the mortgage money, and then sold to S., who assumed payment of the mortgage as part of purchase money. S. then gave a second mortgage to the plaintiffs, and then further mortgaged the land. Default having been made, the plaintiffs sued defendant to recover the amount of his mortgage, and prayed for judgment for the whole amount unpaid; but neither sale nor foreclosure was asked.

Held, that the plaintiffs were entitled to judgment on the covenant against defendant for the amount of his mortgage; but that defendant was entitled to a lien on the land for the amount of the mortgage, which, as between him and S., S. had bound himself to pay; and leave was given to defendant to amend and bring the proper parties before the Court so as to enforce his lien. *The Hamilton Provident Loan and Investment Company v. Smith*, 1.

2. *Conveyance—Merger—Chattel mortgage of growing crops—Fructus industriales.*—A. C., owner of certain lands, mortgaged them to a loan company, and afterwards executed two successive mortgages to one H. Afterwards, in 1887. A. C. sowed a quantity of fall wheat, and in January, 1888, made a chattel mortgage of this wheat to G., which chattel mortgage was properly registered. On April 4th, 1888, before the harvest, under pressure from H., A. C. conveyed to H. the lands for a consideration equal to what was due on the three mortgages, and a small additional unsecured debt due from him to H. On April the 5th, 1888, H. leased the property to A. J. C. for a year.

When the fall wheat was ripe A. J. C. cut and harvested it, but G. sent and seized it under his chattel mortgage, and A. J. C. now brought this action to recover its value.

Held, that on his taking the conveyance from A. C., the rights of H., as mortgagee, were merged, for the evidence pointed strongly against an intention on his part that the mortgage debts should remain, and therefore G.'s right as chattel mortgagee became prior in point of time to the title of H., and the action must be dismissed. As mortgagee

H. would no doubt have had the right to take possession of the crops as part of his security. *Cameron v. Gibson*, 233.

3. *Insurance money—Application upon mortgage—Application of payments*—R. S. O. 1887 ch. 102, sec. 4.]—The defendant held a mortgage upon the plaintiff's lands to secure \$300 with interest, to be paid yearly together with an instalment of principal money not less than \$50, the first instalment of principal and interest to fall due on December 16th, 1888. On June 29th, 1888, a fire occurred, and the defendant received \$195 insurance money; without communicating with the plaintiff, he thereupon assumed to apply this as follows: he reckoned the interest up to the receipt of the money, and deducting that credited the balance on the whole sum advanced; and no payment of the first instalment being made by the mortgagor on December 16th, 1888, he proceeded to exercise his power of sale.

Held, on motion for an injunction to restrain the sale, that the rules as to appropriation of payments did not apply, the insurance money not constituting a payment in the ordinary sense of that word, and the mortgagor having had no opportunity of first directing its appropriation.

Held, also, that though the mortgagee had the right as declared by R. S. O. 1887 ch. 102, sec. 4, to apply the insurance money in satisfaction of the money that ought to be paid under the mortgage, it was not competent to him to accelerate the times of payment, or to alter in any respect the terms of the instrument without the consent of the mortgagor. The insurance money must be applied from time to time

as payments fell due under the mortgage, unless otherwise arranged between the parties. *Corham v. Kingdon*, 432.

See BANKS AND BANKING, 4—COMPANY, 3—CONSTITUTIONAL LAW, 3—DOWER, 2—FRAUDULENT PREFERENCE—PARTITION—WAY.

MUNICIPAL CORPORATIONS.

1. *Power to take stock in bridge company—Special Act—R. S. O. ch. 184, sec. 340—Special rate to be levied each year—Form of.*—*Held*, that sub-sec. 11 of sec. 479 of the Municipal Act, R. S. O. ch. 184, providing that the council of a municipality may pass by-laws for taking stock, &c., in an incorporated company, in respect of any bridge, &c., “under and subject to the respective statutes in that behalf,” only authorizes the passing of by-laws to take such stock where in any special or general Act under which a bridge, &c., company is incorporated, a provision is contained authorizing the municipal council to hold such stock, &c.

Where, therefore, the Act incorporating a bridge company did not profess to confer any power on the municipality to take stock, &c., in such company, no power was conferred under the Municipal Act to do so; and a by-law passed by the municipal council for such purpose was therefore held bad, and directed to be quashed.

The by-law instead of, as required by sec. 340 of the Municipal Act, directing specific sums to be raised each year for the payment of the debt and interest to be so raised in each year by a special rate sufficient therefor, leaving the amount of the

rate to be determined in each year, directed that during the currency of the debentures a special rate of so much on the dollar, specifying it, over and above all other rates, should be levied and collected in each year.

Held, this also rendered the by-law bad. *Re Peck and the Corporation of the Township of Ameliasburg*, 54.

2. *Drainage—Compensation—Municipal Act, R. S. O. ch. 184, secs. 591-2.*—The owner of certain lands in the defendants' township, through which a drain had been made by them under the drainage sections of the Municipal Act, made a claim for damages, upon which an arbitration was had and compensation awarded him, it being shewn that it would be necessary to construct a bridge to cross his farm; to put up and maintain flood gates; and that he was deprived of about three and a half acres of land.

Held, that the case came within secs. 591-2 of the Municipal Act, under which he was entitled to the compensation awarded, which must be assessed on the lands liable to assessment for the drainage work. *In re Byrns and the Corporation of the Township of Rochester*, 354.

3. *Expropriation of lands—Compensation to owners—Method of estimating—Benefit to lands not taken—Special assessment—49 Vic. ch. 66 (O.).*—Under the authority of 49 Vic. ch. 66 (O.) the city of Toronto expropriated the lands of private persons near the river Don, for the purposes of the “Don Improvement Scheme.” By the Act the city council were to make a survey and plan of the 400 feet on each side of a certain line called “the centre line,” shewing the lands taken by them,

and were to apportion to each lot shewn upon the plan a due share of the whole cost of the land, works, and improvements; and by sec. 4, sub-sec. 3, the lands not taken within the 400 feet were to be specially assessed in respect of such improvements, but no such special assessment was to exceed the actual value of the benefit derived from the improvement.

The appellants owned lands extending from the centre line to a distance exceeding 400 feet, and the city took from such lands a strip narrower than the 400 feet.

Held, that in awarding compensation to the appellants under the Municipal Act for the parts of their lands taken, the arbitrators should allow for any benefit to the parts not taken, but in estimating that benefit they should take into account, as best they could, the fact that the land-owners were liable to be charged by the city to the extent of the benefit they received, by a rate as for a local improvement under sec. 4, sub-sec. 3. *Re Richardson and the City of Toronto. Re Hospital Trust and the City of Toronto*, 491.

4. *By-law—Submission to electors—Liquor License Act, R. S. O. ch. 194, sec. 42—“Electors,” meaning of.*—Sec. 42 of the Liquor License Act, R. S. O. ch. 194, provides for the council of any municipality passing a by-law requiring a larger duty to be paid for tavern or shop licenses than is imposed by sec. 41, “but not in excess of \$200 in the whole, unless the by-law had been approved by the electors in the manner provided by the Municipal Act, with respect to by-laws which before their final passing require the assent of the electors of the municipality.”

A municipal council having submitted to the electors and passed a

by-law providing for a larger duty than \$200, a motion was made to quash it on the ground that certain leaseholders had not been allowed to vote upon it, it being assumed by the council that sec. 309 of the Municipal Act, R. S. O. ch. 184, governed as to the votes of leaseholders.

Held, that sec. 309 did not apply; and that the word “electors” in sec. 42 must be read as referring to the same class as “electors” in sub-sec. 14 of sec. 11 of R. S. O. ch. 194, viz., those entitled to vote at an election for a member of the Legislative Assembly; and the reference to the Municipal Act in sec. 42 must be confined to the manner of holding the election.

The by-law, not having been submitted to or approved by the electors according to this interpretation of the statute, was quashed with costs. *Re Croft and the Town of Peterborough*, 522.

5. 52 Vic. ch. 73, sec. 14, (O.)—*Representation previous to submission of money by-law—Costs.*—Under 52 Vic. ch. 73, sec. 14, (O.), the corporation of the city of Toronto “may by by-law entrust the management and control of the erection and completion of the proposed new combined court-house and city hall, * * to a commission consisting of three members, who shall be appointed by by-law.”

The council previous to the submission to the vote of the electors of a by-law for the raising of money to erect such court-house, published a pamphlet which contained under the heading, “Some of the reasons why the buildings should be erected,” this clause: “In order that the buildings may be erected in accordance with the plans and specifications, * * legislation has been obtained author-

izing the appointment of three commissioners, to whom will be entrusted the supervision of the work." After the by-law was approved of and passed, the council decided not to appoint commissioners.

In an action by a ratepayer to enjoin the corporation from proceeding with the work, pending the appointment of such commissioners, or for a mandamus ordering the council to make such appointment, it was

Held, that as there was no person or class of persons for whose benefit the power under 52 Vic. ch. 73, sec. 14, (O.), was conferred, or upon whom a right was conferred to have it exercised, such power was not obligatory but only permissive.

Held, also, that as the representation contained in the pamphlet formed no part of the by-law, and was not a representation of an existing fact, but a mere statement of intention, and formed no part of a binding bargain between the corporation and the ratepayers, there was nothing to bind the former to adhere to it, and they were at liberty to revoke or disclaim that intention and take another course, and that the action should be dismissed; but, as the conduct of the corporation was so discreditable in the matter, their costs were refused.

Remarks upon the practice of taking a *plebiscite* upon a subject wholly within the discretion of a corporation. *Darby v. The Corporation of the City of Toronto et al.*, 554.

6. *Assumption of township road by county—Liability of county—Remedy over a gainst township—Municipal Act, sec. 531, sub-secs. 1, 4; sec. 533; sec. 566, sub-sec. 5—Construction of.* —Action by plaintiff for damages for the loss of his horse, which was killed

by falling into a ditch dug by the township on a road therein, under a drainage by-law. The township council had passed a by-law for opening and establishing this road, and shortly after the county council had passed a by-law, "assuming the road as a county road of the said county for the purpose of expending thereon the county appropriation, and for such purpose only." The money of the county was expended from year to year on the said road. The county by-law was proposed or seconded by the township reeve, and its validity, although never assented to by by-law, was never disputed by the township.

Held, that by their by-law the county had assumed the road as a county road, and there was no power in the statute authorizing them to limit the assumption in the manner proposed; and under the circumstances the county could not set up the absence of a township by-law assenting to the assumption.

Sec. 533 and sub-sec. 5 of sec. 566 of R. S. O. ch. 184, relied on by the county, were held not applicable to this case.

Held, also that the county, under sec. 531, sub-sec. 1, were bound to keep the road in road in repair and were liable to plaintiff, but under sub-sec. 4 they were entitled to judgment over against the township.

—*Balzer v. The Corporation of the Township of Gosfield South and the Corporation of the County of Essex*, 700.

7. *Internal walls of buildings—Right to prescribe the thickness, &c., of—Party wall—What constitutes.* —The 10th sub-sec. of sec. 496 of the Municipal Act, R. S. O. ch. 184, as regards walls of existing buildings, only applies to external walls thereof and not to internal

walls, and therefore municipal councils have no power to prescribe of what materials or of what thickness such internal walls should be. Sub-sec. 18 relating to party walls does not apply to internal walls separating buildings belonging to the same owner, for to constitute party walls they should separate the adjoining properties of different owners.

Where, therefore, a by-law was passed by the corporation of the city of H. prescribing the materials and thickness of the internal walls of every building, which, therefore, included existing buildings, and the defendant was convicted thereunder, by reason of, in the course of dividing a building erected before the passing of the by-law, and owned by him, into three separate shops, making the dividing walls of less thickness than that prescribed by the by-law, the by-law was held bad, and a conviction made thereunder was quashed. *Regina v. Copp*, 738.

8. *By-law in aid of harbour works*—*Raising money by loan*—*Time of repayment uncertain*—*R. S. O. ch. 184, sec. 340, sub-sec. 2; sec. 293, sub-sec. 1*—*Submitting by-law to electors*—*Day fixed for taking votes*—*Motion to quash*—*Applicant voting against by-law not stopped*—*Costs*.]—Section 340 of the Municipal Act, R. S. O. ch. 184, which authorizes municipal councils to pass by-laws for contracting debts, &c., provides, sub-sec. 2, that the whole of the debt and the obligations to be issued therefor shall be made payable in twenty years at furthest, from the day on which such by-law takes effect.

A by-law of a municipality to raise by way of loan \$3,000 to aid in repairing harbour works, provided that the debentures should be made

payable annually, the first payment to be made on the 15th day of December in the year next succeeding the year in which the "repairs will have been completed."

Held, that, as the time of repayment was uncertain, the by-law was not in accordance with sec. 340, sub-sec. 2, and was therefore illegal and should be quashed.

Semble, also, that it was a fatal objection to the by-law that the day fixed by it for taking the votes of the electors thereon was more than five weeks after the first publication, contrary to sec. 293, sub-sec. 1, of the Act.

Held, also, that the applicant had not by voting *against* the by-law disentitled himself to apply to the Court to quash it, or to the costs of his motion. *Re Armstrong and the Township of Toronto*, 766.

See ASSESSMENT AND TAXES, 1—CANADA TEMPERANCE ACT, 4, 5—TAVERNS AND SHOPS.

NEGLIGENCE.

1. *Action under R. S. O. ch. 135*—*Action within six months by person beneficially entitled through death of intestate*.]—An action for damages by reason of the death of a person can be maintained under R. S. O. ch. 135, sec. 7, by the person beneficially entitled, though brought within six calendar months from the death, unless there be at the time an executor or administrator of the deceased. *Lampman v. The Corporation of Gainsborough*, 191.

See DAMAGES — RAILWAYS AND RAILWAY COMPANIES, 1, 2, 3, 4, 5.

NEGOTIABLE INSTRUMENT.

See **BANKS AND BANKING**, 5—**CRIMINAL LAW**, 5.

NEWSPAPER.

See **DEFAMATION**, 1.

NEW TRIAL.

See **DEFAMATION**, 3—**JURY**, 1, 3—**RAILWAYS AND RAILWAY COMPANIES**, 2.

NEXT OF KIN.

See **WILL**, 6.

NOTICE.

To owner, of arrears of taxes, an essential requisite to power of sale.]—See **ASSESSMENT AND TAXES**, 2.

Of action.]—See **JUSTICE OF THE PEACE**, 2.

To quit.]—See **LANDLORD AND TENANT**, 2.

ORDER IN COUNCIL.

See **CANADA TEMPERANCE ACT**, 4.

OVERHOLDING TENANT.

See **LANDLORD AND TENANT**, 2.

PARTIES.

Devises not necessary, to an action for dower.]—See **DOWER**, 1.

When husband necessary party to conveyance by wife.]—See **HUSBAND AND WIFE**, 1.

See also **DOWER**, 2—**MORTGAGE**, 1—**NEGLIGENCE—TRUSTS AND TRUSTEES**, 3.

PARTITION.

Land in different counties—Jurisdiction of local Master—Mortgage of his share by tenant in common—Right of co-tenant to redeem—Simple contract creditor of mortgagor—Right to redeem—Damages.]—Where lands are situate in different counties, a local Master has no jurisdiction to make an order for the partition or sale thereof, and such an order and the proceedings thereunder, even as to lands within the county in which he is Master, are wholly void.

Regina v. Smith, 7 P. R. 429, followed.

Where an undivided interest in land is mortgaged by the owner thereof, a co-owner has no right of redemption.

A simple contract creditor of a mortgagee, as such, has no right to redeem. *Nichol v. Allenby*, 275.

See **DOWER**, 2.

PARTNERSHIP.

Bills of sale and chattel mortgages—Mortgage to one partner for firm debt—Affidavit of bona fides.]—Where an arrangement has been entered into between the partners of a firm whereby, although moneys were to be advanced by the firm, the securities therefor were to be taken in the individual name of each partner according as each was willing

to accept the security of the person seeking to borrow :

Held, that a chattel mortgage so taken was valid as against creditors, and that the mortgagee could properly make the affidavit of *bona fides*.

Semble, there is no legal objection to a loan being made by one member from the moneys of a firm, and the taking as a security therefor a chattel mortgage to himself. *The Hobbs Hardware Company v. Kitchen*, 363.

See CONTRACT, 1.

PARTY WALL.

See MUNICIPAL CORPORATIONS, 7.

PAYMENT.

See BANKS AND BANKING, 1—LIEN.

PENALTY.

See FOREIGN JUDGMENT.

PETITION.

See INTOXICATING LIQUORS.

PLEADING.

See DEFAMATION, 3—EJECTMENT—WILL, 5.

POLICE MAGISTRATE.

See CANADA TEMPERANCE ACT, 3—JUSTICE OF THE PEACE, 3.

POSSESSION.

See LANDLORD AND TENANT, 1.

POWER TO MORTGAGE.

See TRUSTS AND TRUSTEES, 4.

POWER TO SELL.

See TRUSTS AND TRUSTEES, 4.

PRACTICE.

Action by company in liquidation—Objection to right to sue taken at trial—Chambers motion.—See COMPANY, 3.

Action for recovery of land—Entry of judgment for possession—Order of trial Judge—Writ of possession—Rules 273, 274, 275, 341, 379, O. J. A.—R.S.O. 1877 ch. 51, sec. 34.—See EVIDENCE, 2.

PREFERENCE.

See FRAUDULENT PREFERENCE.

PRINCIPAL AND AGENT.

See CANADA TEMPERANCE ACT, 6—CONTRACT, 1—FRAUDULENT PREFERENCE.

PRINCIPAL AND SURETY.

See BAIL.

PRIORITIES.

See EXECUTION—WILL, 3.

PRIVILEGE.

Against criminal proceedings.—
See DEFAMATION, 1.

See also DEFAMATION, 2—EVIDENCE, 2.

PROHIBITION.

1. *County Courts—Claim within jurisdiction of.*—Where, in an action in the County Court, judgment is given for a sum in itself within the jurisdiction of the Court, but which is the balance of a sum beyond the jurisdiction, and which was arrived at not by any settlement or statement of account between the parties, but as the ascertainment of a disputed account:

Held, this was the allowance of a claim beyond the jurisdiction of the Court, and a writ of prohibition was granted. *Sherwood v. Cline*, 30.

2. *Division Court—Title to land.*—The plaintiff agreed to sell to the defendant a parcel of land for \$1,750, of which \$10 was paid on the execution of the written agreement. The agreement contained no provision as to possession, but the defendant went into possession as the purchaser. The plaintiff was unable to make title, and the defendant continued in possession for a considerable time.

The plaintiff brought a Division Court action for use and occupation. The defendant set up that the contract had not been rescinded when he gave up possession, and that he never became tenant to the plaintiff nor liable to pay rent.

Held, that the plaintiff was bound to prove a contract, express or implied, to pay compensation for the use and occupation, and in order to

do so, it might have been necessary to show when the contract of sale went off; but that was not a bringing of the title into question so as to oust the jurisdiction of the Division Court.

2. That in prohibition the Court must be satisfied that the title really comes in question; it is not enough that some question is raised by the defendant's notice.

Purser v. Bradburne, 7 P. R. 18, distinguished.

Order of STREET, J., granting prohibition reversed. *Re Crawford v. Seney*, 74.

3. *Division Court—Territorial jurisdiction—Transcript to another Division Court after judgment.*—A plaint was brought in the first Division Court of Middlesex upon a contract signed by the defendant, dated at London, to pay to the order of the plaintiffs at London, "\$16 in wood delivered on the Hamilton and North Western Railway," which was not in Middlesex. The defendant resided in the county of Simcoe.

Held, that the Court in which the plaint was brought had no jurisdiction.

The defendant filed a notice disputing the claim and the jurisdiction, but did not appear at the trial, and judgment was given against him. Subsequently a transcript of the judgment was transmitted to the seventh Division Court of Simcoe.

Held, that the judgment did not thereby become a judgment of the Simcoe Court, and prohibition to the Middlesex Court was granted after such transmission. *Re Elliott & Son v. Norris*, 78.

4. *Division Court—Jury trial—Judge withdrawing case from jury.*—In a Division Court suit

a jury was demanded and called, but the presiding Judge withdrew from their consideration everything except the amount of damages to be awarded, saying that there were no facts in the case disputed, the plaintiff's evidence being uncontradicted. The jury assessed the damages, and judgment was entered for the plaintiff.

Held, that where the plaintiff furnishes evidence which the Judge thinks sufficient to support his case, the case cannot be withdrawn from the jury; the mere fact that the defendant does not call evidence to controvert the plaintiff's evidence does not conclude the matter, for the jury might refuse to credit the plaintiff, and properly find a verdict for the defendant. The Judge in this case exceeded his jurisdiction by assuming the functions of the jury; and the right to have the case submitted to the jury being an absolute statutory right, the violation of it was ground for prohibition. *Re Lewis v. Old*, 610.

PROMISSORY NOTE.

See CRIMINAL LAW, 2, 3, 5.

PROPERTY AND CIVIL RIGHTS.

See CONSTITUTIONAL LAW, 1.

PROVINCIAL LEGISLATURE.

See CONSTITUTIONAL LAW, 1.

PUBLIC POLICY.

See CONTRACT, 3.

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PUBLIC SCHOOLS.

1. *Change of school site—Meeting of ratepayers—Public School Act—Form of resolution—Compound resolution—R. S. O. 1887 ch. 225, secs. 32, 64.*—Where it appeared that at a meeting of ratepayers called, pursuant to sec. 64 of R. S. O. 1887 ch. 225, to provide for a change of the school-site, a resolution for that purpose and also an amendment thereto were submitted, both of which, in addition to the main question as to change of site, embraced matters collateral thereto, the former of which was carried:

Held, that the resolution was invalid, and that certain deeds of conveyance executed pursuant thereto must be set aside.

It is essential that the vital matter voted on should be so laid before the meeting that a fair vote thereon can be given, unequivocally indicating the mind of the majority on the particular point.

Held, however, that as the plaintiffs were present at the meeting, and it was their business to have then objected to the way in which the question was being submitted, and complained to the inspector under sec. 32 of the said Act, they should not have their costs of action. *McGugan v. School Board of Southwold, Section No. 7*, 428.

2. *Suspension of pupil—Mandamus to trustees—Discretion—Delay—Change of position.*—A pupil at a public school having injured the top of a school desk by cutting it, he was ordered by the schoolmaster to replace the top with his own hands, and was suspended till he should do so. The suspension was on the 20th February, 1888, and on the 7th May, 1889, notice of

motion was served by the father of the pupil for a mandamus to compel the trustees to re-admit the son. In the meantime appeals had been made by the father to three of the trustees, to the Public School Board, and to the annual school meeting, on all of which applications the action of the teacher was sustained. During this time the pupil attended another school.

Held, that the discretion exercised by the master and trustees should not be interfered with, especially after the delay and change in the position of affairs. *Re McCallum and Board of Public School Trustees of Section 6, Township of Brant*, 451.

RAILWAYS AND RAILWAY COMPANIES.

1. *Negligence—Dry grass growing on side of track—Fire therefrom—Liability of company.*—During a very dry summer—little rain having fallen, and none for some time prior to the fire in question, fires also having been frequent in that section of the country—the defendants allowed brush and long dry grass which had been growing for two or three years to remain uncut on the side of the track adjoining the plaintiff's farm, while they had the day previous to the fire, for the protection of their own property on the other side of the track, burnt up the dry grass, etc., there. A spark from defendants' engine having set fire to the dry grass, etc., adjoining the plaintiff's land, the fire extended and destroyed his fences, growing crops, etc. In an action against defendants therefor, all these circumstances were laid before the jury, who found for the plaintiff.

Held, that the case having been properly submitted to the jury, their verdict could not be interfered with. *Flannigan v. The Canadian Pacific Railway Company*, 6.

2. *Negligence—Invitation to passenger to board moving train—Patent danger—Question for jury—New trial.*—The plaintiff, who was a passenger on a train of the defendants, alighted at a station, and the train having started before he had re-entered it, endeavored to jump on while it was in motion. In doing so he was injured, and brought this action for damages for negligence. There was evidence of an invitation by the conductor of the train to jump on while it was in motion, and the jury found (1) that there was such invitation. They also found (2) that the plaintiff used a reasonable degree of care in endeavoring to get on; and (3) that he was injured while trying to get on, in pursuance of the request of the conductor.

It was argued by the defendants that the danger to the plaintiff was so patent and obvious that he had no right to act on the conductor's invitation, or to attempt to get on the train.

Held, that this was a matter which should have been submitted to the jury, and that it was not covered by the second finding; that the questions involved in the action could not be determined upon the findings, and that there should be a new trial.

Per ARMOUR, C.J.—Questions for the jury suggested. *Curry v. Canadian Pacific Railway Company*, 65.

3. *Negligence—Ringing bell or sounding whistles—Contributory negligence.*—Action against defendants for an injury sustained by

being run over by defendants' train at a highway crossing, caused, as alleged, by the omission to ring the bell or sound the whistle. The persons in charge of the train swore that the whistle was sounded in compliance with the statutory requirements. The plaintiff said he heard a whistle which he thought thought came from a round house near by, but which might have been from the approaching train, and though the plaintiff's witnesses stated they did not hear the whistle, it was quite consistent with their evidence that the whistle was sounded. The plaintiff as he approached the track looked to the north-west for shunting engines, which he knew were going backwards and forwards all the time, and so did not look to the south-west, being the direction in which the train was approaching, and if he had been looking he would have seen the train and the accident would have been avoided. A person following immediately behind plaintiff saw the train and stopped his wagon.

Per ROSE and MACMAHON, JJ. No negligence on defendants' part was proved, for it could not be held on the evidence that the whistle was not sounded as required.

Per GALT, C. J. There was contributory negligence on the plaintiff's part in approaching the crossing in not looking in the direction of the approaching train.

Per ROSE, J. The mere fact of the plaintiff not looking in that direction was not, under the circumstances, evidence of contributory negligence. *Blake v. The Canadian Pacific Railway Company*, 177.

4. *Negligence—Accident—Proximate cause—Impact.*—The plaintiffs,

husband and wife, sued for damages for injuries sustained by the wife, charging the defendants with negligence in using their railway in shunting cars &c., and in not notifying and protecting the public at crossings.

The wife was being driven in a cutter by her son along a street which crossed three tracks of the defendants, and when the cutter was thirty feet away a "silent" car passed along one of the tracks. The son pulled the horse up suddenly, with the effect of throwing the mother out of the cutter, and so producing the injury complained of.

The jury found that the defendants were guilty of negligence, and that the son by his driving contributed to the accident.

Held, that, upon the evidence, the finding of contributory negligence could not be interfered with; and that the injury was too remote a consequence to be attributed to the negligence of the defendants. *Atkinson v. Grand Trunk R. W. Co.*, 220.

5. *Negligence—Contributory negligence—Travelling by freight train—Injury caused by shock of connecting cars—Getting into train before it is made up.*—The plaintiff was going from I. to M. by train in charge of cattle. At T. the train on which he had come from I. was partly broken up, to be re-made with some cars which were standing on another track. While there the plaintiff, unknown to the defendants, went into the caboose at the end of the cars which were to be added to the cars from I., and when the connection was about to be made, deliberately stood up, and was washing his hands when the shock of the connection caused the injury for

damages for which this action was brought.

Held, affirming the decision of ROSE, J., that there was no evidence of negligence on the defendants' part; and the mere fact of the accident happening to the plaintiff was not in itself sufficient evidence of negligence.

Held, also, that there was evidence of contributory negligence, in that the plaintiff knew that he was in a freight train, where there would not be so much care shown, and yet stood up, instead of sitting down, as he might have done, while the connection was being made, especially as he entered the caboose before the train was made up, and had no reason to think that the defendants knew that he was there. *Hutchinson v. The Canadian Pacific R. W. Co.*, 347.

6. *Loss of local custom by use of railway — Compensation — Speculative damages.*—Where, under the Railway Act, 51 Vic. ch. 29 (D.), the owner of a mill, who was also the owner of a lot adjoining it, which was used as the principal means of communication between the mill and a public highway, and across which lot a railway company had erected a trestle bridge, also sought compensation for the loss of local custom to and from the mill, not arising from the construction of the railway, but from a subsequent user of it.

Held, that the damages were too remote and speculative to be allowed. *The St. Catharines R. W. Co. v. Norris*, 667.

7. *Railway company—Agreement to pay minimum sum out of joint traffic rates—Ultra vires—Legislation legalizing.*—By an agreement

entered into between the plaintiffs and the Toronto, Grey, and Bruce Railway Company, it was agreed that there should be certain joint rates chargeable to passengers and freight by the steamship company and the railway company to be divided in certain proportions; and if it should be found that the proportion payable to the steamship company did not at the end of the season amount to the sum therein stipulated, then that the deficiency should be made good by a rebate from the share of the railway company; and, on the other hand, if the steamship company received more than the sums mentioned in the agreement, the railway company were entitled to a share of the surplus. Subsequently, an agreement was entered into whereby the Toronto, Grey, and Bruce Railway Company leased their line to the Ontario and Quebec Railway Company, the latter agreeing to assume the contract with the plaintiffs. This agreement was ratified by Act of Parliament. The Ontario and Quebec Railway Company made a lease of their line to the Canadian Pacific Railway Company, which was confirmed by Act of Parliament, and by which Act the Canadian Pacific Railway Company were to assume all contracts of the Toronto, Grey, and Bruce Railway Company, including the one with the plaintiffs.

Held, that, even if the agreement between the plaintiffs and the Toronto, Grey, and Bruce Railway Company were *ultra vires* the latter company, it was made valid by the subsequent legislation; but, apart therefrom, it was in no sense objectionable. *The Owen Sound Steamship Co. v. The Canadian Pacific R. W. Co. and The Ontario and Quebec R. W. Co.*, 671.

8. *Condition limiting liability for loss of baggage — Evidence — Letters written between the company's officers—Admissibility of—Limitation of action.*—In an action by the plaintiff, a passenger by defendants' railway, for the loss of her baggage, and in which the defence was that the defendants' liability was limited by a condition on the ticket to \$100, certain letters were admitted in evidence, one written by the defendants' baggage agent to the passenger agent asking whether plaintiff's attention had been called to the condition on the ticket, and why it had not been signed by her, and the other the reply thereto, stating that the company's rules did not require unlimited first-class tickets signed, and that this ticket had been sold at full tariff rate.

Held, that the letters were properly admitted; but they were of no consequence, as the ticket on its face shewed that it was not purchased subject to the condition.

Kirkstall Brewing Co. v. Furness Railway Co., L.R. 9 Q.B. 468, followed.

Held, also, that the six months' limitation clause, R.S.C. ch. 109, sec. 27, does not apply to an action of this character, arising out of contract, but to actions for damages occasioned by the company in the execution of the powers given or assumed by them to be given for enabling them to maintain their railway.

The cases on this subject reviewed. *Anderson v. The Canadian Pacific Railway Company*, 747.

See COPYRIGHT, 2.

RATIFICATION.

In writing by infant, after majority.—See HUSBAND AND WIFE, 2.

RECOGNIZANCE.

2. *Absence of affidavit of justification — Sufficiency — R. S. C. ch. 178, sec. 90.*—By sec. 90 of R. S. C. ch. 178, and the Rule of Court thereunder, no motion to quash any conviction brought before any Court by certiorari shall be entertained unless the defendant is shewn to have entered into a recognizance with one or more sufficient sureties.

Held, that the sufficiency of the suretyship is not shewn by the mere production of the recognizance, but there must be evidence on which the Court can say they were sufficient sureties.

Where therefore there was no affidavit of justification to the recognizance, it was held not to comply with the statute. *Regina v. Richardson*; *Regina v. Addison*, 729.

See BAIL.

REDEMPTION.

Right of co-owner to.—See PARTITION.

REGISTRATION.

See LIEN—WILL, 3.

RELEASE.

See CONTRACT, 2—DEED.

RIGHT OF WAY.

See WAY.

RULES.

Rule 89 of T. T. 1856.]—*See* BAIL.

Rule 80, O. J. A.]—*See* CONTRACT, 1.

Rules 273, 274, 275, O. J. A.]—*See* EVIDENCE, 2.

Rule 341, O. J. A.]—*See* EJECTMENT—EVIDENCE, 2.

Rule 379, O. J. A.]—*See* EVIDENCE, 2.

Con. Rule 676.]—*See* EVIDENCE, 1.

Con. Rule 1062.]—*See* BAIL.

Con. Rule 1064.]—*See* BAIL.

Con. Rule 1065.]—*See* BAIL.

SALE OF LAND.

See ASSESSMENT AND TAXES, 2, 3.

SET-OFF.

See BANKS AND BANKING, 3—LIEN—DAMAGES.

SHAREHOLDER.

See COMPANY, 1, 2.

SHERIFF.

See BANKRUPTCY AND INSOLVENCY.

SOLICITOR.

See EVIDENCE, 2—FRAUDULENT PREFERENCE.

STATUTE OF FRAUDS.

See HUSBAND AND WIFE, 2.

STATUTE OF LIMITATIONS.

See DEED—NEGLIGENCE—RAILWAYS AND RAILWAY COMPANIES, 8—TRUSTS AND TRUSTEES, 1.

STATUTES.

24 Geo. II. ch. 24.]—*See* JUSTICE OF THE PEACE, 2.

4 Wm. IV. ch. 1, sec. 48.]—*See* TRUSTS AND TRUSTEES, 2.

14 & 15 Vic. ch. 7, sec. 2.]—*See* DEED.

Con. Stat. C. ch. 81, sec. 5.]—*See* COPY-RIGHT, 2.

British N. A. Act, sec. 91, par. 27.]—*See* CONSTITUTIONAL LAW, 1.

British N. A. Act, sec. 91, par. 21.]—*See* CONSTITUTIONAL LAW, 2.

31 Vic. ch. 1, sec. 29, (O.)]—*See* JUSTICE OF THE PEACE, 2.

33 Vic. ch. 40, (D.)]—*See* CONSTITUTIONAL LAW, 2.

39 Vic. ch. 33, sec. 2, sub-sec. 14, (O.)]—*See* TAVERNS AND SHOPS.

R. S. O. 1877 ch. 50, secs. 40, 42.]—*See* BAIL.

R. S. O. 1877 ch. 51, sec. 34.]—*See* EVIDENCE, 2.

R. S. O. 1877 ch. 111, sec. 75.]—*See* WILL, 3.

R. S. O. 1877 ch. 125, secs. 3, 4.]—*See* HUSBAND AND WIFE, 1.

R. S. O. 1877 ch. 138, sec. 4.]—*See* LAW SOCIETY.

R. S. O. 1877 ch. 162.]—*See* INSURANCE, 14.

R. S. O. 1877 ch. 180, secs. 109, 155, 156.]—*See* ASSESSMENT AND TAXES, 2.

43 Vic. ch. 10, (O.)]—*See* EXECUTION.

47 Vic. ch. 20, sec. 2, (O.)—*See* INSURANCE, 4.

49 Vic. ch. 48, sec. 2, (D.)—*See* CANADA TEMPERANCE ACT, 4.

49 Vic. ch. 66, sec. 4, sub-sec. 3, (O.)—*See* MUNICIPAL CORPORATIONS, 3.

R. S. C. ch. 43, sec. 26.]—*See* INDIAN LANDS.

R. S. C. ch. 62, sec. 4.]—*See* COPY-RIGHT, 1.

R. S. C. ch. 106, sec. 12.]—*See* CANADA TEMPERANCE ACT, 5.

R. S. C. ch. 106, sec. 100.]—*See* CANADA TEMPERANCE ACT, 6.

R. S. C. ch. 109, sec. 27.]—*See* RAILWAYS AND RAILWAY COMPANIES, 8.

R. S. C. ch. 120, secs. 43, 65.]—*See* BANKS AND BANKING, 5.

R. S. C. ch. 120, secs. 45, 77.]—*See* BANKS AND BANKING, 2.

R. S. C. ch. 120, sec. 53, sub-sec. 4.]—*See* BANKS AND BANKING, 4.

R. S. C. ch. 129.]—*See* BANKS AND BANKING, 3.

R. S. C. ch. 129, sec. 31.]—*See* COMPANY, 3.

R. S. C. ch. 129, sec. 45.]—*See* BANKS AND BANKING, 2.

R. S. C. ch. 138, sec. 14.]—*See* LAW SOCIETY.

R. S. C. ch. 158, secs. 4, 6, 9.]—*See* GAMING.

R. S. C. ch. 164, sec. 2, sub-sec. (e.), sec. 65, sub-sec. 2.]—*See* CRIMINAL LAW, 5.

R. S. C. ch. 164, sec. 78.]—CRIMINAL LAW, 2.

R. S. C. ch. 168, sec. 58.]—*See* JUSTICE OF THE PEACE, 5.

R. S. C. ch. 178, sec. 39.]—*See* CANADA TEMPERANCE ACT, 3.

R. S. C. ch. 178, sec. 48.]—*See* CANADA TEMPERANCE ACT, 5.

R. S. C. ch. 178, sec. 77.]—*See* JUSTICE OF THE PEACE, 1.

R. S. C. ch. 178, sec. 90.]—*See* RECOGNIZANCE.

R. S. O. 1887 ch. 5, sec. 1.]—*See* CANADA TEMPERANCE ACT, 5.

R. S. O. 1887 ch. 44, sec. 53, sub-sec. 10.]—*See* DOWER, 2.

R. S. O. 1887 ch. 61, sec. 6.]—*See* HUSBAND AND WIFE, 2.

R. S. O. 1887 ch. 61, sec. 38.]—*See* WILL, 5.

R. S. O. 1887 ch. 73, sec. 4.]—*See* JUSTICE OF THE PEACE, 2.

R. S. O. 1887 ch. 102, sec. 4.]—*See* MORTGAGE, 3.

R. S. O. 1887 ch. 108, sec. 4.]—*See* DOWER, 1.

R. S. O. 1887 ch. 109, sec. 12.]—*See* WILL, 8.

R. S. O. 1887 ch. 123, sec. 6.]—*See* HUSBAND AND WIFE, 2.

R. S. O. 1887 ch. 124, sec. 3.]—*See* FRAUDULENT PREFERENCE.

R. S. O. 1887 ch. 124, secs. 4, 9.)—*See* EXECUTION.

R. S. O. 1887 ch. 126, secs. 9, 10, 16, and schedule.]—*See* LIEN.

R. S. O. 1887 ch. 132, sec. 4, sub-secs. 2, 3.]—*See* HUSBAND AND WIFE, 1.

R. S. O. 1887 ch. 135, sec. 7.]—*See* NEGLIGENCE.

R. S. O. 1887 ch. 136. —*See* INSURANCE, 4.

R. S. O. 1887 ch. 145, sec. 36.]—*See* BARRISTER AND SOLICITOR.

R. S. O. 1887 ch. 148, sec. 45.]—*See* MEDICAL PRACTITIONER.

R. S. O. 1887 ch. 157, sec. 2, sub-sec. 6.]—*See* COMPANY, 2.

R. S. O. 1887 ch. 167, sec. 114, sub-sec. 16.)—*See* INSURANCE, 1.

R. S. O. 1887 ch. 184, sec. 293, sub-sec. 1.]—*See* MUNICIPAL CORPORATIONS, 8.

R. S. O. 1887 ch. 184, sec. 309.]—*See* MUNICIPAL CORPORATIONS, 4.

R. S. O. 1887 ch. 184, sec. 340.]—*See* MUNICIPAL CORPORATIONS, 1.

R. S. O. 1887 ch. 184, sec. 340, sub-sec. 2.]—*See* MUNICIPAL CORPORATIONS, 8.

R. S. O. 1887 ch. 184, sec. 364.]—*See* ASSESSMENT AND TAXES, 4.

R. S. O. 1887 ch. 184, sec. 421.]—*See* TAVERNS AND SHOPS.

R. S. O. 1887 ch. 184, sec. 479, sub-sec. 11.]—*See* MUNICIPAL CORPORATIONS, 1.

R. S. O. 1887 ch. 184, sec. 496, sub-sec. 10.]—*See* MUNICIPAL CORPORATIONS, 7.

R. S. O. 1887 ch. 184, sec. 531, sub-secs. 1, 4.]—*See* MUNICIPAL CORPORATIONS, 6.

R. S. O. 1887 ch. 184, secs. 533, 566, sub-sec. 5.]—*See* MUNICIPAL CORPORATIONS, 6.

R. S. O. 1887 ch. 184, secs. 591, 592.] *See* MUNICIPAL CORPORATIONS, 2.

R. S. O. 1887 ch. 185, secs. 20, 28, 29, 30.]—*See* ASSESSMENT AND TAXES, 4.

R. S. O. 1887 ch. 193, secs. 12, 120, 132, 133.]—*See* ASSESSMENT AND TAXES, 1.

R. S. O. 1887 ch. 193, sec. 7.]—*See* ASSESSMENT AND TAXES, 4.

R. S. O. 1887 ch. 193, sec. 7, sub-sec. 1.]—*See* CONSTITUTIONAL LAW, 2.

R. S. O. 1887 ch. 193, sec. 189.]—*See* ASSESSMENT AND TAXES, 3.

R. S. O. 1887 ch. 194, sec. 11, sub-secs. 8, 14.]—*See* INTOXICATING LIQUORS, 1.

R. S. O. 1887 ch. 194, secs. 41, 42.]—*See* MUNICIPAL CORPORATIONS, 4.

R. S. O. 1887 ch. 194, sec. 53, sub-sec. 3.]—*See* INTOXICATING LIQUORS, 2.

R. S. O. 1887 ch. 225, secs. 32, 64.]—*See* PUBLIC SCHOOLS, 1.

51 Vic. ch. 29, (D.)]—*See* RAILWAYS AND RAILWAY COMPANIES, 6.

51 Vic. ch. 29, sec. 3, (O.)]—*See* ASSESSMENT AND TAXES, 4.

51 Vic. ch. 33, sec. 1; sec. 2, sub-secs. 2, 9; sec. 3, (O.)]—*See* TAVERNS AND SHOPS.

51 Vic. ch. 32, (O.)]—*See* CONSTITUTIONAL LAW, 1—JUSTICE OF THE PEACE, 3.

51 Vic. ch. 42, secs. 1, 3 (D.)]—*See* GAMING.

52 Vic. ch. 73, sec. 14, (O.)]—*See* MUNICIPAL CORPORATIONS, 5.

STOCK GAMBLING.

See GAMING.

SUMMARY CONVICTION.

See CANADA TEMPERANCE ACT, 1, 2, 3 — GAMING — INDIAN LANDS — JUSTICE OF THE PEACE, 1, 2, 3, 4 — MEDICAL PRACTITIONER — MUNICIPAL CORPORATIONS, 7 — RECOGNIZANCE — TAVERNS AND SHOPS.

SURRENDER.

See BAIL.

TAVERNS AND SHOPS.

Closing shops—By-law for—Discrimination—Illegality—Distress— 51 Vic. ch. 33, (O.)—37 Vic. ch. 73,

sec. 2, sub-sec. 14—R.S.O. ch. 184, sec. 421.]—A by-law passed by the town of A. under sec. 2, sub-sec. 2, of the Ontario Shops Regulation Act, 51 Vic. ch. 33 (O.) provided, section 1, That all shops, &c., where goods were exposed or offered for sale by retail in the town, should be closed at 7 p.m. on each day of the week, excepting Saturday, from the 15th January to the 15th September, &c. Section 3 provided that it should not be deemed an infraction of the by-law for any shopkeeper or dealer to supply any article after 7 p.m. to mariners, owners, or others of steam-boats or vessels calling or staying at the port of A.

Held, that the by-law was bad, for that section 3 was illegal in discriminating between different classes of tradesmen, and was in contravention of sub-sec. 9 of said sec. 2 of the Act.

A conviction of the defendant under the by-law was therefore quashed.

Held, also, that a provision for distress in default of payment of the fine and costs imposed, did not constitute a part of the penalty or punishment imposed by the by-law, but was merely a means of collecting the penalty as authorized by sec. 2, sub-sec. 14, of 39 Vic. ch. 33 (O.) and sec. 421 of the Municipal Act, R. S. O. ch. 184. *Regina v. Flory*, 715.

See MUNICIPAL CORPORATIONS, 4.

TAXES.

See ASSESSMENT AND TAXES.

TAX SALE.

See ASSESSMENT AND TAXES, 2, 3.

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TELEPHONE COMPANY.

See CONTRACT, 3.

TENANCY IN COMMON.

See TRUSTS AND TRUSTEES, 2.

TENANCY BY THE CURTESY.

See HUSBAND AND WIFE, 1.

TENANCY AT WILL.

See LANDLORD AND TENANT, 1.

TIMBER.

Sale of standing timber—Real property or chattel—Sale of right to cut timber for twenty years—Subsequent sale to another of the same timber during that period—Costs—Superior Court scale—"Title to land"—Conversion.]—Where one sold and assigned to another all the pine timber he might choose to cut for twenty years, with the right to make roads to get to and remove the same, and a covenant that the grantee might, without let or hindrance from any one, cut and remove the timber:

Held, (PROUDFOOT, J., dissenting), that the timber so sold together with the rights imparted to the purchaser were an interest in land and not chattel property.

Where having first granted such timber and rights to the plaintiff's assignor, the defendant five years after sold the timber to another person, who forthwith proceeded to cut the same:

Held, that the defendant was responsible to the plaintiff in dam-

ages; and, *per* FERGUSON, J., that he would have been so even if the timber sold were chattel property, for that the act of the defendant in selling to another person would in that case amount to a conversion of the property.

Per FERGUSON, J. In order that a deed may be reformed by the Court there must be at least two things established, namely, an agreement differing from the document well proved by such evidence as leaves no reasonable ground for doubt as to the existence and terms of such agreement, and a mutual mistake of the parties by reason of which such agreement was not properly expressed in the deed. *McNeill v. Hoines*, 479.

TITLE TO LAND.

See PROHIBITION, 2 — TIMBER — TRUSTS AND TRUSTEES, 1.

TITLE BY POSSESSION.

See DEED—TRUSTS AND TRUSTEES, 1.

TORT.

See MASTER AND SERVANT.

TRIAL JUDGE.

See JURY, 2.

TRUST AND TRUSTEES.

1. *Limitation of actions — Marriage settlement — One of beneficiaries taking possession — Subsequent appointment as trustee — Title by pos-*

session. — On 25th July, 1853, J. M. by marriage settlement conveyed certain property, including an hotel, to trustees to permit him to receive the rents for his life, excepting a life annuity to his wife, and on his death, subject to such annuity, to pay annuities to each of his two daughters, S. M. and C. A. M., and subject thereto to divide the balance of the rents annually into three equal shares, and to apply one share to the support and education of a deceased son, W. M. M.; another share to a son, R. D. M., and the third share to his daughter, F. E. C., with limitations over. On 27th March, 1860, by a decree in Chancery W. and O. were appointed trustees in the place of B. and P., and the trust estate was vested in them. J. M. died on the 12th March, 1870. W. M. M.'s children all died in J. M.'s lifetime, and their said one-third share having thereby reverted to J. M., he disposed of same by his will. On 10th May, 1882, judgment of the High Court was pronounced directing the removal of W., the surviving trustee, that an account be taken, and appointing R. D. M. and R. C. trustees; and also directing that all lands, etc., and all other assets both real and personal now vested in W. as such trustee be vested in R. D. M. and R. C. upon the several trusts in the said settlement and will. On the death of J. M., R. D. M. had entered into possession of the hotel and continued in such possession, receiving the rents to his own use without any question after the said judgment, and up to his death on 17th April, 1887. By his will and codicil, dated respectively 27th April, 1880, and 25th October, 1881, he devised to his executors his real estate, consisting of the said hotel property, upon trust to pay the rents

to his wife for life, and after her death to divide same equally among his children. In 1888 an action was brought by three of his children to have it declared that the hotel was vested in R. C., the surviving trustee, under the trusts of the settlement, &c.

Held, that the action could not be maintained, for that when R. D. M. took possession of the hotel in 1870 he did not go in under the trustees, but adversely to them, and continued to so hold till his death, and the judgment of May, 1882, whereby R. D. M. was appointed one of the trustees, and the trust estate vested in them, could not be extended beyond its ordinary meaning so as to take away a property of which he had become the absolute owner and put it back into the trust estate. *Murchison v. Murchison*, 254.

2. *Deed—Construction of—Trustees and beneficiaries as joint tenants, and not as tenants in common—Executed trusts—Estate in fee—Tenants in common—Mesne profits.*]

By a settlement certain lands were conveyed to trustees, upon trust to hold the said land * * situated * * being lot No. 2 * * to G. A.; and also lot No. 1, situated * * to A. A., sons of (the settlor) * * to the use of them, their heirs and assigns, as joint tenants, and not as tenants in common * * and, lastly, upon trust, that the said trustees * * shall well and sufficiently convey and assure absolutely in fee to the said parties respectively, &c.

Held, that this trust was an executed trust, in which the limitations were expressly declared, and that neither a difficulty in ascertaining the true construction and legal meaning of the words used, nor the

final trust directing the trustees to make the conveyances of the legal estate made any difference; and that the words must receive the same construction as if they were found in a common law conveyance.

Held, also, that an estate in fee in lot 2 passed to G. A., and that the words, "as joint tenants, and not as tenants in common," were used to prevent G. A. and A. A. from taking as tenants in common, as it was supposed they would have taken under 4 Wm. IV. ch. 1, sec. 48, and that they were needlessly used.

Held, also, that as G. A. died intestate and unmarried after January 1st, 1852, the defendants, as the children of a deceased brother of the plaintiff, took an equal share in the lands as co-tenants in common with the plaintiff A. A.; that they were as much entitled to the possession of the lands as the plaintiff; and that the plaintiff having obtained the legal estate from the trustees should hold the same as a trustee for all the tenants in common.

Held, also, that there being no proof of ouster of the plaintiff, he could not recover from the defendants any *mesne profits* in this action. *Adamson v. Adamson et al.*, 407.

3. *Corporation—Trustee, removal of—Dealing with trust funds—Necessity of making Attorney-General party.*]

In an action by an incorporated educational institute for the removal of one of the trustees, who also acted as secretary, for alleged improper dealing with the corporate funds, judgment was given, but without any finding of wilful misconduct, directing such trustee's removal, on the ground that so much doubt was cast upon his dealings with the trust funds that it would not be proper to

allow him to remain a member of the board.

Such an action is maintainable without making the Attorney-General a party. *The Wilberforce Educational Institute v. Holden*, 439.

4. *Legal estate—Power to sell—Implied power to take back mortgage for part of price—Power to sell with consent of certain persons—Subsequent provision that said persons were to have first option of purchase—Construction.*]—Under a certain will the executors were directed to sell and dispose of a farm "either at public or private sale as to them may seem best, for the best price, and on the most advantageous terms that reasonably can be obtained for the same."

Held, that the power to sell involved a power to secure part of the price by means of a mortgage on the property sold, the manner of sale being left to the discretion of the trustees.

Acting under the above power, the executors sold and conveyed the premises to certain trustees on trust for the infant children of M. G. in fee, but with a proviso that the grantees might absolutely dispose of the premises with the consent in writing of a majority of such of the children as had attained 21, and a further proviso that in case either of the grantees, or of the children on attaining 21, should desire to part with their interest in the premises, the same should be first offered to the other members of the family.

Three of the children had attained 21 years and were willing to consent to the sale.

Held, that the deed to the trustees containing apt words might be treated as a deed of bargain and sale, vesting the legal estate in them upon

the trusts mentioned, and that the right to sell existed.

Held, also, that the subsequent provision as to the children buying from one another on attaining 21 was not inconsistent with or repugnant to the exercise of the power of sale at present, but would still be operative if no previous sale were made. *Re Graham Contract*, 570.

See ASSESSMENT AND TAXES, 3—
CRIMINAL LAW, 5—WILL, 4.

ULTRA VIRES.

See CONSTITUTIONAL LAW, 1—
JUSTICE OF THE PEACE, 3—RAIL-
WAYS AND RAILWAY COMPANIES, 7.

VALUABLE SECURITY.

See CRIMINAL LAW, 2.

VENDOR AND PURCHASER.

See HUSBAND AND WIFE, 1.

VENUE.

See JURY, 1.

VESTING ORDER.

See DOWER, 2.

WAIVER.

See INSURANCE, 2, 3.

WAREHOUSE RECEIPTS.

See BANKS AND BANKING, 4.

WARRANT OF COMMITMENT.

See JUSTICE OF THE PEACE, 2, 5.

WAY.

Access to road—Rights of way over adjoining lots—Rights of mortgagees—Way of necessity—Extinguishment by unity of possession—Reversion on termination of possession.

—C. conveyed to R. 50 acres of land and also a strip 20 feet wide, to the south, to give access from the 50 acres to the town line. R. mortgaged to C. the 50 acres, but not the 20 feet strip, and then conveyed the strip to N. Afterwards R. conveyed the 50 acres to his son, subject to C.'s mortgage, and on the same day gave him the occupation under an agreement for sale of the adjoining 50 acres to the west. The son mortgaged to the plaintiff the 50 acres conveyed to him. During the possession of R. and his son they got access from the east 50 acres to the side line through the west 50 acres owned by R. The agreement for sale of the west 50 acres to the son having been cancelled, and R. having refused to allow a tenant of his son of the east 50 acres access to the side line through the west 50 acres, the plaintiff brought this action against R., C., and N. for a declaration as to the existence of a right of way through the strip conveyed to N., or of a way of necessity through the west 50 acres, and for other relief.

Held, that if a right of way through the 20 feet strip did pass to C. under the mortgage to him, it was a right of way only to C., his heirs and assigns; and the existence of a right in the plaintiff to redeem C. did not give her the rights of C. until after redemption. But

Held, that the plaintiff was entitled to a declaration of the existence of a way of necessity through the west 50 acres, which was given by way of implied grant when R. conveyed to his son. The exercise of the implied grant was suspended during the time that the son had possession of the west 50 acres, but upon the termination of that possession the implied grant and the right of way under it were revived. *Lupton v. Rankin et al.*, 599.

WILL.

1. *Construction—Devise “if my father does not alter his will”—Legacies—Vesting.*]—A testator by his will provided that in case his father did not revoke his will and so deprive him (the testator) of certain lands therein devised to him, then he (the testator) devised to S. certain lands, but in the event of his father altering his will and depriving him (the testator) of the lands therein devised to him, then he devised the said land otherwise.

He then bequeathed pecuniary legacies to certain of his children, adding in the case of those of them who were under eighteen, the words, “to be paid to them when they come of age,” and concluding, “I do hereby authorize and direct my said executors to invest the moneys devised to my children in good legal securities, until they arrive of age, and the interest obtained from such investment to be paid to my wife to assist her in supporting and educating my family.”

The father of the testator did not revoke or alter his will in the way referred to, but the testator predeceased him.

Held, that the words relating to

the alteration of his will by the father of the testator must be construed as meaning that if the testator became the owner of the lauds devised in his father's will, so that he could have a disposing power over them, then that they should go in the manner mentioned.

Held, also, that the pecuniary legacies were all of them vested; and that the legacy left to each child which did not attain twenty-one within the year after the testator's death, was to be invested until each child came of age, and the interest up to the several times when they should each attain twenty-one should be applied in assisting the widow or mother to maintain and educate such child or children, and as each child attained twenty-one he or she would be entitled to be paid their respective legacies. *Re Sproule, Sharp v. Sproule*, 334.

2. *Attestation — Legatee — Evidence—New attestation.*]—A will having been attested by one of the legatees, the solicitor for the testator being present at the time, and apprehensive that the legatee was incompetent, signed the will himself, and procured another also to do so, but the name of the legatee was not struck out of the attestation clause.

Held, that evidence was admissible to prove the actual state of the case, and it thus appeared that the mistake of having the legatee as an attesting witness had been remedied, not by striking out her name, but by the parties proceeding to a new attestation and subscription of the will, and the legatee was therefore not incapacitated from taking under the will. *Re Sturgis, Webbing v. Van Every*, 342.

3. *Execution—Attestation*—"De-

pendent relative revocation"—*Devise to infants—Conveyances by heirs-at-law — Registration — Priorities —R. S. O. 1877 ch. 111, sec. 75—"Inevitable difficulty" — Crops — Possession — Costs.*]—The plaintiffs were the devisees of the land in question in this action under the will of H. O'N.; the defendant A. O'N., the father of the plaintiffs, was one of the heirs-at-law, and had obtained conveyances of the land from the other heirs-at-law of H. O'N.; and the defendant O. was the assignee of all the estate of A. O'N., and had besides a mortgage from A. O'N. on the land in question.

On the 17th April, 1877, H. O'N. signed a will in the presence of one witness; another witness was then called in, before whom the testator acknowledged his signature, and then both witnesses signed in the presence of the testator and of each other. On the 23rd April, 1877, the testator, desiring to have two changes made, caused two of the sheets of the will to be re-written and read to him; the two new sheets were then put into the place of the old ones, the document pinned together, and on the last sheet, which was not one of those re-written, the date 17th was changed to 23rd; the same witnesses were then called in, and the testator then acknowledged his signature to the will, and each of the two witnesses his. The two sheets taken out of the will were afterwards destroyed by one H., by the direction of the testator, but not in his presence. The testator died a few days after this without having made any other will. The will of the 23rd of April was offered for probate, but was refused by a Surrogate Court.

Held, that the will of the 17th April was duly executed; but that the will of the 23rd April was not

duly executed, and probate was properly refused; and the will of the 17th April was not revoked by the destruction of the two sheets out of the presence of the testator, nor by the defective execution of the will of the 23rd April, the intention of the testator not being to cancel the whole of the earlier will, but only to make two changes in it, and he being under the belief that the latter will was a valid one; and it was adjudged that the earlier will should be admitted to probate.

By this will the plaintiffs were to come into possession when they should become of the age of 21 years, not being less than 12 years from the date of the testator's death, and they were infants of tender years at the time when, after the death of H. O'N., the defendant A. O'N., their father and guardian, agreed with the other heirs-at-law for the purchase of their shares, on the assumption that H. O'N. had died intestate, and obtained conveyances from them. A. O'N. and the other heirs-at-law were at this time aware of the facts in regard to both the wills, and were also aware that, after probate of the will of the 23rd April had been refused, it was the opinion of the solicitor for the estate that the will of the 17th April was properly executed and that probate might be obtained.

Held, that the plaintiffs' rights were not defeated or prejudiced by the agreement and conveyances referred to; nor were the plaintiffs' rights defeated by the registration of the conveyances to A. O'N. and his assignment and mortgage^o to O.; for A. O'N. had actual notice and knowledge of the plaintiffs' rights; and that the plaintiffs, who were not guilty of any wilful neglect or default, were prevented from registering the will by "inevitable difficulty"

or "impediment," within the meaning of R. S. O. 1877 ch. 111, sec. 75.

The defendant O. by a counterclaim asked for damages, being the value of a crop in the ground and deprivation of possession of the land for a year or more, but a reference to assess these damages was refused.

The plaintiffs and the defendant O. were allowed costs out of the estate, except that the defendant O. was ordered to pay the costs occasioned by charges made by him of fraud and collusion; no costs were allowed to or against the defendant A. O'N.

McLeod v. Truax, 5 O. S. 435, specially observed upon. *O'Neil et al. v. Owen et al.*, 525.

4. *Devise*—"Wish and desire"—*Precatory trust—Estate in fee.*—A testator by his will made an absolute gift of all his property to his wife, subject to the payment of debts, legacies, funeral and testamentary expenses, and by a subsequent clause provided as follows: "And it is my wish and desire after my decease that my said wife shall make a will dividing the real and personal estate and effects hereby devised and bequeathed to her among my said children in such manner as she shall deem just and equitable."

Held, that this did not create a precatory trust, and that the wife took the property absolutely.

In re Adams and The Kensington Vestry, 27 Ch. D. 394, and *In re Diggles, Gregory v. Edmondson*, 39 Ch. D. at p. 257, specially referred to and followed.

The change in the current of decision on the subject of precatory trusts remarked upon. *Bank of Montreal v. Bower et al.*, 548.

5. *Action for recovery of land*—

Probate—Evidence of will—Pleading—Common source of title—Indirect admission in pleading—R. S. O. 1887 ch. 61, secs. 38, 44.]—In an action for the recovery of land, the plaintiffs claimed title under a deed from the executors of one S., but the only evidence of that will produced by them was the copy of the probate from the Registry office, with the affidavit of verification attached.

Held, that this was not proper evidence of the will, no notice having been given under R. S. O. 1887 ch. 61, sec. 38.

The plaintiffs, however, sought to support their case by reference to a certain statement in the defendants' pleading, in which, besides denying their right to recover, she herself also claimed title under a deed from the executors of S.

Held, that they could not take that part of the pleading which suited their purpose and reject the rest: they could not use a scrap of it to eke out the insufficiency of their own evidence. *Barber et al. v. McKay et al.*, 562.

6. *Construction*—"Heirs and representatives"—*Meaning of—Next of kin.*—Where a testator by his will, in which he used the words "executor" and "executrix" several times, made a residuary bequest and devise to "the heirs and representatives of M. B."

Held, that, having regard to the context, the next of kin according to the Statute of Distributions, and not the executor of M. B., were entitled to take under the above words.

The weight of decision shows that the word "representatives" when standing alone means "executors or administrators," but that very

slight expressions in the context have turned the meaning in the other direction to that of "next of kin."—*Burkitt v. Tozer et al.*, 587.

7. *Devise—Condition in restraint of sale—Restricted to name and family of testator.*—A testator by his will devised certain real estate to two of his nephews subject to the following condition: "But neither of my said nephews is to be at liberty to sell his half of the said property to any one except to persons of the name of O'S., in my own family; this condition is to attach to every purchaser of the said property."

Held, that the condition was valid.

Re Watson and Woods, 14 O. R. 48, distinguished. *O'Sullivan v. Phelan et al.*, 730.

8. *Absence of subscribing witnesses—Want of proof of their existence or handwriting—Action to establish will.*—In an action to establish a will in the handwriting of the testator, purporting to be executed in the presence of two subscribing witnesses, who could not be found, and whose handwriting could not be proved, and probate whereof had been refused by the proper Surrogate Court, a motion for judgment asking to have the will established and probate thereof granted, notwithstanding that all parties interested consented, was dismissed, and the application refused, on the ground that sufficient evidence had not been produced to show that such will was the will of the testator under R. S. O. ch. 109, sec. 12. *Williamson et al. v. Williamson*, 734.

See TRUSTS AND TRUSTEES, 4.

WINDING-UP ACT.

See **BANKS AND BANKING**, 2, 3—
COMPANY, 3.

WITNESS.

Juryman at inquest may be.]—See **CORONER**.

Constable who delivers summons for coroner may be.]—See **CORONER**.
See **WILL**, 8.

WORDS.

1. "*Completely executed by payment,*" in sec. 9, ch. 104, *R. S. O.* 1887, means voluntary or involuntary payment to the sheriff.]—See **EXECUTION**.

2. "*Electors.*"—See **MUNICIPAL CORPORATIONS**, 4.

3. "*Good,*" marking a cheque.]—See **BANKS AND BANKING**, 1.

4. "*Hay,*" in sec. 26, *R. S. C. ch.* 43, means natural grass or grass grown and cultivated.]—See **INDIAN LANDS**.

5. "*Heirs and representatives.*"—See **WILL**, 6.

6. "*Married Man.*"—See **INSURANCE**, 4.

7. "*Impediment,*" neglect to register will by.]—See **WILL**, 3.

8. "*Inevitable difficulty,*" neglect to register will by.]—See **WILL**, 3.

9. "*Negotiation*" within the meaning of sub-sec. 4, sec. 53, *R. S. C. ch.* 120.]—See **BANKS AND BANKING**, 4.

10. "*Or otherwise in force in Ontario with respect to any property therein*" in sec. 114, ch. 167, *R. S. O.* 1887, make section applicable to all insurance policies existing at the time the Act came into force.]—See **INSURANCE**, 1.

11. "*Remise, release, and quit claim,*" in deed operate since 14 & 15 *Vic. ch.* 7, sec. 2, as a grant, and before or since as bargain and sale.]—See **DEED**.

12. "*Retired Judge.*" A Judge who resigns without superannuation and resumes practice, is within sec. 4, ch. 138, *R. S. O.* (1877.)—See **LAW SOCIETY**.

13. "*Shareholder.*"—See **COMPANY**, 2.

14. "*Unlawfully,*" effect of omission of in warrant of commitment.]—See **JUSTICE OF THE PEACE**, 5.

15. "*Wish and desire.*"—See **WILL**, 4.

C. J. B.

ERRATA.

1. Page 3, for "*Wilson v. Roper*," read "*Rogers v. Wilson*."
2. " 36, line 14, for "75 L. T. N. S.," read "56 L. T. N. S."
3. " 37, line 25, for "*White v. Gilchrist*, 12 P. R. 573," read *White v. Galbraith*, 12 P. R. 513."
4. " 110, line 3 of head-lines, and line 3 of head-note, for "R. S. C. ch. 130," read "R. S. C. ch. 120."
5. " 518, line 19, for "ch. 525," read "ch. 125."
6. " 549, line 13, after *Eames*, insert L. R. 6 Ch.
7. " 723, line 3, for "14 O. R. 333," read "13 P. R. 158 note."

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